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United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

FRANK MENEFEE, B. F. BONNEWELL, H. M.

TODD and OSCAR A. CAMPBELL,

Plaintiffs in Error,

VS.

THE UNITED STATES OF AMERICA,

Defendant in Error.

TRANSCRIPT OF RECORD ON WRIT OF ERROR

To the District Court of the United States for the District of Oregon.

Filed

MAR 27 1916

F. D. Monckton,

Clerk,

United States Circuit Court of Appeals

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*United States Circuit Court of Appeals for the
Ninth Circuit.*

Frank Menefee, B. F. Bonnewell, H. M. Todd and
Oscar A. Campbell,

Plaintiffs in Error,

vs.

The United States of America,

Defendant in Error.

**NAMES AND ADDRESSES OF THE ATTOR-
NEYS OF RECORD.**

Mr. Martin L. Pipes,
Chamber of Commerce Building, Portland, Oregon,

Mr. J. J. Fitzgerald,
Mohawk Building, Portland, Oregon,
and

Mr. John F. Logan,
Mohawk Building, Portland, Oregon,
For the Plaintiffs in Error.

Mr. Clarence L. Reames,
United States Attorney, Postoffice Building, Port-
land, Oregon,
For the Defendant in Error.

CITATION ON WRIT OF ERROR.

United States of America,
District of Oregon,—ss.

To United States of America,
Greeting:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, within thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the District Court of the United States for the District of Oregon, wherein Frank Menefee, B. F. Bonnewell, H. M. Todd, and Oscar A. Campbell, are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Given under my hand, at Portland, in said District, this 1st day of March in the year of our Lord, one thousand, nine hundred and sixteen.

R. S. BEAN,
Judge.

Due service of the within citation is hereby accepted this 1st day of March, 1916.

Clarence L. Reames, United States Attorney.

Filed March 1, 1916.

G. H. Marsh, Clerk.

*In the United States Circuit Court of Appeals for the
Ninth District.*

Frank Menefee, B. F. Bonnewell, H. M. Todd, and
Oscar A. Campbell,

Plaintiff in Error,

vs.

The United States of America,

Defendant in Error.

WRIT OF ERROR.

The United States of America,—ss.

The President of the United States of America.

To the Judge of the District Court of the United States
for the District of Oregon:

Greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the District Court before the Honorable Robert S. Bean, one of you, between The United States of America, Plaintiff and Defendant in Error, and Frank Menefee, B. F. Bonnewell, H. M. Todd, and Oscar A. Campbell, Defendants and Plaintiffs in Error, a manifest error hath happened to the great damage of the said Plaintiff in Error, as by complaint doth appear; and we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid, and, in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid,

with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, California, within thirty days from the date hereof, in the said Circuit Court of Appeals to be then and there held; that the record and proceedings aforesaid, being then and there inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States of America should be done.

WITNESS the Honorable Edward Douglas White, Chief Justice of the Supreme Court of the United States this 11th day of February, 1916.

G. H. Marsh,
Clerk of the District Court of the United States for the
District of Oregon.

Seal, United States)
District Court,) }
District of Oregon.)

Filed February 11, 1916.

G. H. Marsh,
Clerk, United States District Court, District of Oregon.

*In the District Court of the United States for the
District of Oregon.*

November Term 1914.

BE IT REMEMBERED, That on the 27th day of February, 1915, there was duly filed in the District

Court of the United States for the District of Oregon,
an Indictment, in words and figures as follows, to wit:

INDICTMENT.

*In the District Court of the United States for the
District of Oregon.*

United States of America,

vs.

Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E.
Gernert, B. F. Bonnewell, H. M. Todd, Joseph
Hunter, O. L. Hopson, P. E. Muraine and Oscar
A. Campbell,

Defendants.

INDICTMENT for Violation of Section 37 of the
Penal Code.

United States of America,

State and District of Oregon,—ss.

The Grand Jurors of the United States of America
for the District of Oregon, duly impaneled, sworn and
charged to inquire in, of and concerning the commission
of crime within and for said district, upon their oaths and
affirmations do allege, present, find and charge:

That at and during all of the times and dates in this
indictment mentioned, stated, designated and specified,
United States Cashier Company has been and now is a
corporation organized and existing under and by virtue
of the laws of the State of Oregon with its principal
office and place of business in the City of Portland, in

the County of Multnomah and within the State and District of Oregon aforesaid.

That at all of the times between the 1st day of September, 1910, and the 31st day of January, 1914, the defendant herein, Frank Menefee, was a duly elected, qualified and acting director of said corporation; that at and during all of the times between the 1st day of September, 1910, and the 31st day of January, 1914, he, the said defendant, Frank Menefee, was the duly elected, qualified and acting President of said corporation; that at and during all of the times between the 28th day of September, 1910, and the 31st day of January, 1914, he, the said defendant, Frank Menefee, was the duly elected, qualified and acting General Manager of said corporation.

That at and during all of the times and dates between the 1st day of September, 1910, and the 1st day of November, 1912, the above named defendant, F. M. LeMonn, was the duly elected, qualified and acting sales manager of said corporation.

That at and during all of the times and dates between the 1st day of January, 1911, and the 1st day of April, 1912, the defendant, O. E. Gernert, was an agent and salesman for said corporation, and the duly appointed, qualified and acting assistant sales manager of said corporation.

That at and during all of the times and dates between the 15th day of April, 1911, and the 31st day of January, 1914, the defendant, B. F. Bonnewell, was the

duly elected, qualified and acting fiscal agent for the said corporation, and an agent and salesman for said corporation.

That at and during all of the times and dates between the 15th day of April, 1911, and the 1st day of December, 1913, the defendant, H. M. Todd, was a duly appointed, qualified and acting sales agent for said corporation.

That at and during all of the times and dates between the 26th day of May, 1911, and the 31st day of January, 1914, the defendant, Joseph Hunter, was a duly appointed, qualified and acting sales agent for said corporation.

That at and during all of the times and dates between the 23rd day of November, 1910, and the 1st day of July, 1913, the defendant, O. L. Hopson, was a duly appointed, qualified and acting sales agent for said corporation.

That at and during all of the times and dates between the 6th day of March, 1911, and the 31st day of January, 1914, the defendant, P. E. Muraine, was a duly appointed, qualified and acting sales agent for said corporation.

That at and during all of the times and dates between the 12th day of June, 1911, and the 31st day of January, 1914, the defendant, Oscar A. Campbell, was a duly elected, qualified and acting director of said corporation; that at and during all of the times and dates between the 30th day of January, 1912, and the 31st day

of January, 1914, he, the said defendant, Oscar A. Campbell, was the duly elected, qualified and acting vice-president of said corporation.

That at and during all of the times and dates between the 9th day of June, 1913, and the 31st day of January, 1914, the defendant, Thomas Bilyeu, was a duly elected, qualified and acting director of said corporation.

That at and during all of the times and dates between the 1st day of September, 1910, and the 31st day of January, 1914, the capital stock of the said corporation amounted to the sum of one million two hundred thousand dollars divided and segregated by the Articles of Incorporation of said corporation into one hundred twenty thousand shares of the par value as fixed and stated in said Articles of Incorporation of ten dollars for each and every of said shares.

That at the City of Portland within the County of Multnomah and within the State and District of Oregon, and on or about the 1st day of September, 1910, (the exact date being to the Grand Jurors unknown), the defendants herein, Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine and Oscar A. Campbell, did then and there unlawfully, wilfully and feloniously conspire, confederate and agree together, and with divers other persons to the Grand Jurors unknown, to commit the acts made offenses and crimes by the laws of the United States to prevent the use of the United States mails to promote fraud, to wit: Section Two Hundred Fifteen of the Criminal Code of

the United States; that is to say: the said defendants Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine and Oscar A. Campbell, did then and there unlawfully, wilfully and feloniously conspire, combine, confederate and agree together, and with divers other persons to the Grand Jurors unknown, to devise and execute a scheme and artifice to defraud to be effected by means of the Post Office establishment of the United States, and to obtain money and property by means of false and fraudulent representations, pretenses and promises from Harry Wainright, John Marshall, C. F. L. Smith, Francis Gzella, A. A. Milliken, J. W. Zufall, Harry I. Carruthers, R. O. Holmes, John Straub, T. W. Harris, L. H. Robinson, J. C. Flaherty, C. K. Clarke, E. W. Draper, James Hansen, W. B. Morse, E. D. Paine, R. L. Anderson, E. A. Mulkey, C. A. McMahan, R. L. Robison, E. O. Tobey, S. M. Sim, J. W. Brett, Bert Sallaberry, H. J. Johnson, G. A. Frees, Ole G. Vinger, Herman A. C. Ludecke, William Herzog, Forbes Wiseman, Henry W. Axford, T. Warsop Cooper, Annabelle McRay, Charles E. Hatfield, Matilda O. Johnson, Conrad Stafrin, John Meyers, J. H. Manis, A. L. Pierce, John Irrigoin, Fred Williams, H. J. Shannon, Emma G. Hedges, Mary E. Hall, W. H. Garl, Thomas T. Davies, M. C. Carlson, George F. Cobb, Edward Klein, W. T. Roberts, John H. Ballagh, J. J. Bauer, H. T. Johnson and A. M. Armstrong (the last named fifty-five persons being hereinafter in this indictment designated, termed and called "INVESTORS"), and

from divers other persons to the Grand Jurors unknown, and the public generally, by inducing, inciting, and procuring the said "INVESTORS" and divers other persons to the Grand Jurors unknown, and the public generally, to open communication with the said defendants Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine and Oscar A. Campbell, and with the said United States Cashier Company, a corporation, and by inducing, inciting and procuring the said "INVESTORS" and divers other persons to the Grand Jurors unknown, and the public generally, to purchase from the said defendants Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine and Oscar A. Campbell, and from said corporation, namely: United States Cashier Company, the shares of stock of said corporation, and to pay over, deliver and to transfer to the said defendants Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine and Oscar A. Campbell, and to the said corporation, namely: United States Cashier Company, in exchange and payment for said shares of stock the money and property of the said "INVESTORS" and of divers other persons to the Grand Jurors unknown, the payment of said sums of money to the said defendants Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine and Oscar A. Campbell,

and to the said corporation, namely: United States Cashier Company, and the transfer of said property to the said defendants Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine and Oscar A. Campbell, and to the said corporation, namely: United States Cashier Company, to be induced, incited and procured by the false and fraudulent representations of the said defendants Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine and Oscar A. Campbell, to be made to the said "INVESTORS" and to divers other persons to the Grand Jurors unknown by the said defendants Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine and Oscar A. Campbell.

That it was a part and portion of said unlawful, wilful and felonious conspiracy, so entered into by the said defendants, Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine and Oscar A. Campbell, that said scheme and artifice to defraud the said "INVESTORS" and divers other persons to the Grand Jurors unknown, and the public generally, should be by the said defendants Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine and Oscar A. Campbell carried out, carried on and effected by the further means, methods, manner and plans, that is to say: the said defendants Frank

Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine and Oscar A. Campbell would cause, induce, incite and procure the said "INVESTORS" and many and divers other persons to the Grand Jurors unknown, and the public generally, to pay over and to deliver to and to transfer to the said defendants Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine and Oscar A. Campbell, and to the said corporation in payment of and in exchange for the shares of stock of said corporation, United States Cashier Company, money and property of the value of more than the sum of one million dollars, which said payment of said money and which transfer of said property was to be by the said defendants Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine and Oscar A. Campbell induced, incited, procured and obtained by the dishonest, fraudulent and false representations and promises hereinafter set forth, all to be made to the said "INVESTORS" by the said defendants Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine and Oscar A. Campbell, and to divers other persons to the Grand Jurors unknown, and the public generally, and to swindle, cheat and defraud said "INVESTORS" and each, every and all thereof, and various and sundry other persons to the Grand Jurors unknown, and the public generally, out of

all of the said sums of money and the said property that the said "INVESTORS" and various other persons to the Grand Jurors unknown and the public generally, should pay over and deliver to the said defendants Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine and Oscar A. Campbell, or either thereof, or to the said corporation, namely: United States Cashier Company.

That it was a part and portion of said unlawful, wilful and felonious conspiracy, so entered into by the said defendants Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine and Oscar A. Campbell, that said scheme and artifice to defraud the said "INVESTORS" and divers other persons to the Grand Jurors unknown, and the public generally, should be by the said defendants Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine and Oscar A. Campbell carried out, carried on and effected by the further means, methods, manner and plans, that is to say: that for the purpose of inducing, inciting and procuring the said "INVESTORS" and various and divers other persons to the Grand Jurors unknown and the public generally, to purchase said shares of stock of said corporation and to pay over and to deliver to the said defendants Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine and Oscar A. Campbell, and to the said

corporation, money and property in exchange and payment therefor, the said defendants Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine and Oscar A. Campbell, would falsely and fraudulently and by means of printed advertisements to be by the said defendants Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine and Oscar A. Campbell, inserted in newspapers, in pamphlets, in catalogues, in circulars and in letters, and to be written in letters, which said newspapers, pamphlets, catalogues, circulars and letters were to be by the said defendants transmitted and caused to be transmitted and sent by and through, and by means of the Post Office establishment of the United States, to the said "INVESTORS" and to divers other persons to the Grand Jurors unknown, and by words to be orally spoken by the said defendants Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine and Oscar A. Campbell, represent, pretend and promise that the said corporation, namely: United States Cashier Company owned the patents to a certain "CHANGE COMPUTING MACHINE," a certain "BANK CASHIER MACHINE," a certain "LIGHTNING CHANGE MAKER," a certain "CURRENCY PAYING MACHINE" and a certain "NEW STYLE ADDING MACHINE," and that the said corporation, namely: United States Cashier Company, was engaged in the business of manufac-

turing and selling said machines, and each, every and all thereof; that on account of the said alleged ownership of said patents and the said alleged manufacturing of said machines by said corporation, the said shares of stock of said corporation, namely: United States Cashier Company, were of great commercial value and that large dividends would be by said corporation declared and paid thereon to the said "INVESTORS" and to all other persons who should purchase the same from the said defendants Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine and Oscar A. Campbell, or from the said corporation, namely: United States Cashier Company; that said corporation, namely: United States Cashier Company would declare and pay to all of said "INVESTORS," and to divers other persons to the Grand Jurors unknown, and to all persons who should purchase the shares of stock from said corporation large and certain dividends upon said stock within six months from the date that any of said persons should purchase any of said shares of stock from said defendants Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine and Oscar A. Campbell, or either thereof, or from said corporation, namely: United States Cashier Company; that the said corporation, namely: United States Cashier Company, was the owner and in the possession of large bona fide orders for the purchase of said machines and that on account of said orders for the said machines the said corporation would make a large and

certain profit; that the financial condition of the said corporation, namely: United States Cashier Company, was excellent, and that the assets of said corporation, namely: United States Cashier Company, far exceeded in value the total amount of the liabilities against and owed by said corporation, namely: United States Cashier Company; that a certain large amount of the capital stock of said corporation, namely: United States Cashier Company, the exact amount of the same being to the Grand Jurors unknown, which said stock would be offered for sale to the said "INVESTORS" and to divers other persons to the Grand Jurors unknown and the public generally, belonged to and was the property of the said corporation, namely: United States Cashier Company, and that the money derived from the sale thereof would be by said corporation invested and used in such a manner as to increase the assets of said corporation, namely: United States Cashier Company, and to make its shares of stock more valuable, and particularly for the purpose of purchasing and building factories in which to increase the manufacture of said machines; that inasmuch as the assets of said corporation, namely: United States Cashier Company, exceeded and was greater than the liabilities of said corporation, the said defendants Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine and Oscar A. Campbell, were justified in raising and increasing the selling price of said shares of stock from the said par value of ten dollars each to a selling price of eleven dollars each; from a selling price of eleven dollars each

to a selling price of twelve dollars and fifty cents each; from a selling price of twelve dollars and fifty cents each to a selling price of fifteen dollars each; from a selling price of fifteen dollars each to a selling price of twenty dollars each; from a selling price of twenty dollars each to a selling price of thirty dollars each; and from a selling price of thirty dollars each to a selling price of fifty dollars each.

Whereas, in truth and in fact and as the defendants Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine and Oscar A. Campbell, and each and every and all thereof at and during and between all the times and dates mentioned, specified and stated in this indictment, then and there well knew, neither the said corporation, namely: United States Cashier Company, nor any of said defendants Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine and Oscar A. Campbell, owned the patents to said certain "CHANGE COMPUTING MACHINE," or said certain "LIGHTNING CHANGE MAKER," or said certain "CURRENCY PAYING MACHINE," or said certain "NEW STYLE ADDING MACHINE," or either thereof; and,

Whereas, in truth and in fact and as the defendants Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine and Oscar A. Campbell, and each, every and all thereof at and during and be-

tween all the times and dates mentioned, specified and stated in this indictment, then and there well knew, the said corporation, namely: United States Cashier Company was not engaged in either the business of manufacturing or selling said machines, or any thereof, but on the contrary its business was to sell and dispose of the said shares of stock; and,

Whereas, in truth and in fact and as the defendants Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine and Oscar A. Campbell, and each, every and all thereof at and during and between all the times and dates mentioned, specified and stated in this indictment, then and there well knew, the said shares of stock and each, every and all thereof, were of very little value and of practically no value whatsoever, and said shares of stock and each, every and all thereof were practically worthless; and,

Whereas, in truth and in fact and as the defendants Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine and Oscar A. Campbell, and each, every and all thereof at and during and between all the times and dates mentioned, specified and stated in this indictment, then and there well knew, no dividends whatsoever would ever be by said corporation, namely: United States Cashier Company, either declared or paid to the said "INVESTORS," or to any other person who should purchase the said shares of stock by either the said corporation, namely: United States Cashier Company, or by any of the said defend-

ants Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine and Oscar A. Campbell; and,

Whereas, in truth and in fact and as the defendants Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine and Oscar A. Campbell, and each, every and all thereof at and during and between all the times and dates mentioned, specified and stated in this indictment then and there well knew, none of the said "INVESTORS," or any other person who should purchase said shares of stock, would ever receive, either from said corporation, namely: United States Cashier Company, or from said defendants Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine or Oscar A. Campbell, any dividend whatsoever; and,

Whereas, in truth and in fact and as the defendants Frank Menefee, F. M. LeMonn, Thomas Bilyeu, Joseph Hunter, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine and Oscar A. Campbell, and each, every and all thereof at and during and between all the times and dates mentioned, specified and stated in this indictment, then and there well knew, the said corporation, namely; United States Cashier Company, was neither the owner nor in the possession of the said alleged bona fide orders for the purchase of said machines; and,

Whereas, in truth and in fact and as the defendants Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine and Oscar A. Campbell, and each, every and all thereof at and during and between all the times and dates mentioned, specified and stated in this indictment, then and there well knew, the financial condition of said corporation, namely: United States Cashier Company, was not excellent, but on the contrary at and during all of the times and dates mentioned, specified and stated in this indictment, and as the defendants Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine and Oscar A. Campbell, then and there well knew, the said corporation, namely: United States Cashier Company, was absolutely insolvent; and,

Whereas, in truth and in fact and as the defendants Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine and Oscar A. Campbell, and each, every and all thereof at and during and between all the times and dates mentioned, specified and stated in this indictment, then and there well knew, the value of the assets of said corporation, namely: United States Cashier Company, amounted to a sum much less than the total amount of the liabilities against and owed by said corporation, namely: United States Cashier Company; and,

Whereas, in truth and in fact and as the defendants Frank Menefee, F. M. LeMonn, Thomas Bilyeu,

O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine and Oscar A. Campbell, and each, every and all thereof at and during and between all the times and dates mentioned, specified and stated in this indictment, a very large amount of the shares of stock of said corporation, namely: United States Cashier Company, which the said defendants Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine and Oscar A. Campbell were to in manner and form as hereinbefore alleged represent as being the property of the said corporation, namely: United States Cashier Company, consisted of shares of stock owned by the said defendants Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine and Oscar A. Campbell, and all of the sums of money and all of the property received on account of the sale thereof would be appropriated by the said defendants Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine and Oscar A. Campbell, and none of the same or any part thereof would be paid into the treasury of the said corporation, namely: United States Cashier Company, to be used by it, either for increasing the assets of said corporation, or otherwise; and,

Whereas, in truth and in fact and as the defendants Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine and Oscar A.

Campbell, and each, every and all thereof at and during and between all the times and dates mentioned, specified and stated in this indictment, then and there well knew, none of the said defendants, or any thereof, were at any time on account of the financial condition of said corporation justified in either raising or increasing the selling price of said shares of stock, or any thereof; and,

Whereas, in truth and in fact and as the defendants Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine and Oscar A. Campbell, and each, every and all thereof at and during and between all the times and dates mentioned, specified and stated in this indictment, then and there well knew, each and every person who should purchase any of said shares of stock from said defendants Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine and Oscar A. Campbell, or from said corporation, namely: United States Cashier Company, would suffer and sustain a loss on account of said transaction of all sums of money which any of said persons should pay over or deliver to said defendants Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine and Oscar A. Campbell, or to said corporation, namely: United States Cashier Company, in exchange or payment for said shares of stock.

That it was a further part and portion of said unlawful, wilful and felonious conspiracy so entered into by

said defendants Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine and Oscar A. Campbell, that said scheme and artifice to defraud the said "INVESTORS" and divers other persons to the Grand Jurors unknown, and the public generally, should be by the said defendants Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine and Oscar A. Campbell, carried out, carried on and effected by the further means, methods, manner and plan, that is to say: that for the purpose of inducing, inciting and procuring the said "INVESTORS" and divers other persons to the Grand Jurors unknown, and the public generally, to purchase said shares of stock from said corporation, and from said defendants Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine and Oscar A. Campbell and to pay over and deliver to the said defendants Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine and Oscar A. Campbell, and to the said corporation, money and property in exchange and in payment therefor, the said defendants Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine, and Oscar A. Campbell would from time to time during the existence of said conspiracy fraudulently and dishonestly publish and cause to be published, false

and untrue written and printed statements of the assets of said corporation, and false and untrue written and printed statements of the liabilities owed by said corporation, and false and untrue written and printed statements of the financial condition of said corporation. That in said false and untrue statements of the assets of said corporation, and in each, every and all thereof, the assets of said corporation would be by the said defendants Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine and Oscar A. Campbell, stated to be sums greatly in excess of the true value of all of the assets of said corporation; that in said false and untrue statements of the liabilities owed by said corporation, and in said false and untrue statements of the financial condition of said corporation and in each, every and all thereof, there would be by the said defendants Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine and Oscar A. Campbell, omitted therefrom liabilities owed by said corporation amounting to more than the sum of one-half million dollars.

That it was a further part and portion of said wilful, unlawful and felonious conspiracy, so entered into by the said defendants Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine and Oscar A. Campbell, that said scheme and artifice to defraud the said "INVESTORS" and divers other persons to the Grand Jurors unknown, and the public gen-

erally, should be carried out, carried on and effected by the said defendants Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine and Oscar A. Campbell, selling said shares of stock to the said "INVESTORS" and to divers other persons to the Grand Jurors unknown, in the following states, namely: Oregon, Washington, California, Idaho, Montana, Wyoming, Utah, Texas, Iowa, North Dakota, Michigan, Illinois, Colorado, New York, and many and divers other states to the Grand Jurors unknown.

That it was a further part and portion of said unlawful, wilful and felonious conspiracy, so entered into by the said defendants Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine and Oscar A. Campbell, that the said defendants would so manage and control the business affairs of said corporation, namely: United States Cashier Company, to the end that more than twenty-five per cent of all of the sums of money which should be by the said "INVESTORS" and by divers other persons to the Grand Jurors unknown, and by the public generally, paid over, delivered and transferred to said corporation, namely: United States Cashier Company, and to said defendants Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine and Oscar A. Campbell, in exchange and payment for said shares of stock, would be appropriated by the said defendants Frank Menefee, F. M. LeMonn, Thomas Bilyeu,

O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine and Oscar A. Campbell to their own use and gain.

That it was a part and portion of said unlawful, wilful and felonious conspiracy, so entered into by the said defendants Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine and Oscar A. Campbell, that said scheme and artifice to defraud the said "INVESTORS" and divers other persons to the Grand Jurors unknown, and the public generally, should be by the said defendants Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine and Oscar A. Campbell carried out, carried on and effected by the further means, methods, manner and plans, that is to say: that for the purpose of inducing, inciting and procuring the said "INVESTORS" and various and divers other persons to the Grand Jurors unknown and the public generally, to purchase said shares of stock of said corporation and to pay over and to deliver to the said defendants Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine and Oscar A. Campbell, and to the said corporation, namely: United States Cashier Company, money and property in exchange and payment therefor, the said defendants Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine and Oscar A. Campbell, would increase the selling price

of said shares of stock from the said par value of ten dollars each to a selling price of eleven dollars each; from a selling price of eleven dollars each to a selling price of twelve dollars and fifty cents each; from a selling price of twelve dollars and fifty cents each to a selling price of fifteen dollars each; from a selling price of fifteen dollars each to a selling price of twenty dollars each; from a selling price of twenty dollars each to a selling price of thirty dollars each; and from a selling price of thirty dollars each to a selling price of fifty dollars each.

That it was a further part and portion of said unlawful, wilful and felonious conspiracy, so entered into by the defendants Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine and Oscar A. Campbell, to execute the said scheme and artifice to defraud, and to attempt so to do by placing and causing to be placed in the Post Office of the United States, at Portland, in Multnomah County, Oregon, and causing to be delivered by the Post Office establishment of the United States, the said newspapers, pamphlets, catalogues, circulars and letters, and other letters to be written by the said defendants Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine and Oscar A. Campbell, which said letters would request the said "INVESTORS" and divers other persons to the Grand Jurors unknown, to remit and to pay to the said defendants Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E.

Muraine and Oscar A. Campbell, and to said corporation, namely: United States Cashier Company, money in payment and exchange for said shares of stock, all of said newspapers, pamphlets, catalogues, circulars and letters, to be sent and delivered by the Post Office establishment of the United States to the persons to whom addressed in pursuance of said conspiracy.

That it was a part and portion of said wilful, unlawful and felonious conspiracy so entered into by the said defendants Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine and Oscar A. Campbell, that the said conspiracy, combination and agreement aforesaid should and would continue from the said 1st day of September, 1910, until and including the 1st day of January, 1915; that said conspiracy was to be a continuing conspiracy, and that it was to continue at all times between the 1st day of September, 1910, until and including the 1st day of January, 1915, and that at and during all of the times and dates, the said defendants Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine and Oscar A. Campbell would continue to be parties to said conspiracy and would continue to commit the said acts and crime hereinbefore set forth in detail.

That the said wilful, unlawful and felonious conspiracy, combination and agreement, aforesaid, so entered into by the said defendants Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonne-

well, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine and Oscar A. Campbell, on or about the 1st day of September, 1910, continued from the date of said conspiracy until and including the 1st day of January, 1915; that at and during all of the times and dates between the said 1st day of September, 1910, and the 1st day of January, 1915, said wilful, unlawful and felonious conspiracy, combination and agreement was continually in existence and in operation, and at and during all of said times the said defendants Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine and Oscar A. Campbell continued to wilfully, unlawfully and feloniously conspire, combine, confederate and agree together to commit the said crime hereinbefore set forth in detail.

1. And the Grand Jurors, aforesaid, upon their oaths and affirmations, aforesaid, do further present, allege, find and charge:

That in pursuance and furtherance of the said unlawful conspiracy, combination, confederation and agreement, aforesaid, and to effect the object thereof, the defendant herein, B. F. Bonnewell, did afterwards and on, to wit, the 6th day of February, 1914, at Portland, Oregon, and within the jurisdiction of this court, knowingly, unlawfully and feloniously place and deposit and cause to be placed and deposited in a post office and postal station of the United States post office establishment, to wit, the United States post office at Portland, Oregon, for mailing and delivery and with postage fully prepaid thereon, a certain sealed envelope then and

there addressed to Mr. Bert Sallaberry at Elmdale, Montana, and at the time of the mailing of said sealed envelope, aforesaid, there was then and there enclosed in said envelope a certain letter, which said letter was and is as follows, to wit:

“Portland, Oregon,
Feb. 6th, 1914.

Mr. Bert Sallaberry,
Elmdale, Montana.

Dear Sir: As per your agreement with me you were to send me five hundred dollars more to apply on your note before this date providing I extended one thousand dollars until shearing time in 1914. So send the above amt. by return mail or I will have to turn the note over to an Attorney for collection and that means a lot of costs.

Yours Resp.

B. F. Bonnewell,
1108 E. Flanders St., Portland, Oregon.”

which said letter had theretofore and on February 6, 1914, been written and executed by the said defendant B. F. Bonnewell; with the intent then and there in the said defendant, B. F. Bonnewell, that the said letter contained in the said envelope and the said envelope should be sent, transmitted and delivered by and through the post office establishment of the United States to the said addressee at Elmdale, Montana; and which said letter was then and there of and concerning the aforesaid scheme and artifice to defraud, which said scheme and

artifice to defraud, the said defendants Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine and Oscar A. Campbell had theretofore, as hereinabove alleged, conspired, combined, and agreed to devise and to execute;

2. And the Grand Jurors, aforesaid, upon their oaths and affirmations, aforesaid, do further present, allege, find and charge:

That in pursuance and furtherance of the said unlawful conspiracy, combination, confederation and agreement, aforesaid, and to effect the object thereof, the defendant herein, Frank Menefee, did afterwards and on, to wit, the 23rd day of July, 1912, at Portland, Oregon, and within the jurisdiction of this court, knowingly, unlawfully and feloniously place and deposit and cause to be placed and deposited in a post office and postal station of the United States post office establishment, to wit, the United States post office at Portland, Oregon, for mailing and delivery and with postage fully prepaid thereon, a certain sealed envelope then and there addressed to Mr. E. Klein, at Everett Building, No. 4th Avenue, and 17th St., New York, N. Y., and at the time of the mailing of said sealed envelope, aforesaid, there was then and there enclosed in said envelope a certain letter which said letter was and is as follows, to wit:

"Frank Menefee,
Pres. and Gen. Mgr.

Robert J. Upton,
Secretary.

F. H. Gloyd,
Treasurer.

F. M. LeMonn,
Gen. Sales Manager.

UNITED STATES CASHIER CO.

Manufacturers

Automatic Computing Change-making, Recording
Coin-paying Machines.

Automatic Cashier for Visible Listing and
Banks, Pay Rolls, etc. Adding Machine.

Automatic Change-computing Machine for De-
partment and Retail Stores, etc.

Home Office, Lewis Building.

Portland, Oregon.

July 23, 1912.

Mr. E. Klein,
Everett Building,
No. 4th Avenue, and 17th St.,
New York, N. Y.

Dear Sir:—

Your letter of the 18th instant is received and in answer will say that the writer had quite a talk with Mr. Levi when he was here in Portland and we showed him our factory and gave him such information as we could. He was quite busy with his duties at the Elks Convention and we were not able to show him around as extensively as we would liked to have done.

In regard to stock, Mr. Levi asked us to make a proposition with reference to terms, etc., but did

not indicate what kind of a proposition would be satisfactory to you. With reference to terms, I can furnish you with fifty shares of stock at the rate of \$15 per share as stated to you in our letter of June 21st, and also can arrange to cancel another subscription which was sold at \$15 and turn that over to you also. In both these cases the parties have been unable so far to meet their payments, and one we are ready to cancel and the other we will cancel at once if we hear from you favorably and you wish to take it over. We probably would have to cancel it anyway.

As to terms, we would like to have you take this stock as nearly on a cash basis as possible for the reason that it is now while we are extensively engaged in manufacturing dies, having arranged with Sloan & Chace of Newark, N. J., for several thousand dollars' worth to be made as fast as they can do the work, and also keeping up the work of die making and the work we can do on the manufacture of machines prior to getting all of our dies, that large demands are made on us for ready cash. Also at this season of the year, while of course an amount of this kind is not sufficient to cause any great or serious difference, we would like to keep our reserve fund up to as high a point as possible as collections, both personal and for the company, are much slower now than they will be later in the season after sixty or ninety days. However, we can allow you to pay one-half the amount down, being the amount we offered you in our June 21st letter,

and will give you sixty to ninety days on the balance, you to give us

E. Klein—Page 2.

your note for the amount. We trust this arrangement will be satisfactory to you.

We recently sent you a report of the stockholders' meeting which I hope you received all right. We have been continuing our work stronger than ever since the annual meeting and since the report was written, and while of course it is a large and expensive undertaking, we are in such condition that we can see the daylight ahead both as to time and the financial support necessary to carry our undertaking to a successful termination. In fact, there is no question now confronting us which we will not be able to overcome without serious inconvenience, and the getting of our machines on the market at an early date is absolutely assured.

We are also developing a Currency Paying Machine which we have to a point of demonstrating so that we know it will meet with the approval of the commercial world, and this with our Computing Machine and the small Change Maker, which we are also getting ready for the market, will make a family of machines that cannot fail to give profitable returns to our investors.

Of course, at this time we are confining all of our effort so far as the manufacturing end is concerned, to the Bank Cashier machine as scattering our efforts in so many directions would result in

unnecessary delay in getting to the market with our product. However, the standardizing and developing of other models is being carried forward and now that the standardizing of our commercial Cashier is practically completed, another one of our machines will be taken up and placed in form for commercial manufacture. Our subsequent models, of course, can be handled much quicker and with less outlay than our first machine inasmuch as the standardizing of the Cashier alone works out the standardizing and development of something like eighty per cent of the other models.

Kindly let us hear from you as soon as possible so we will know whether you are going to take this stock.

Yours faithfully,

UNITED STATES CASHIER COMPANY,

Frank Menefee,

President."

which said letter had theretofore and on July 23, 1912, at Portland, Oregon, been written and executed by the said defendant Frank Menefee, with the intent then and there in the said defendant, Frank Menefee, that the said letter contained in the said envelope and the said envelope should be sent, transmitted and delivered by and through the post office establishment of the United States to the said addressee at New York, New York; and which said letter was then and there of and concerning the aforesaid scheme and artifice to defraud, which said scheme and artifice to defraud, the said defendants,

Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine, and Oscar A. Campbell, had theretofore, as hereinabove alleged, conspired, combined and agreed to devise and to execute;

3. And the Grand Jurors, aforesaid, upon their oaths and affirmations, aforesaid, do further present, allege, find and charge:

That in pursuance and furtherance of the said unlawful conspiracy, combination, confederation and agreement, aforesaid, and to affect the object thereof, the defendant herein, Frank Menefee, did afterwards, and on, to wit, the 7th day of June, 1912, at Portland, Oregon, and within the jurisdiction of this court, knowingly, unlawfully and feloniously, place and deposit and cause to be placed and deposited in a post office and postal station of the United States post office establishment, to wit, the United States post office at Portland, Oregon, for mailing and delivery and with postage fully prepaid thereon, a certain sealed envelope then and there addressed to Dr. A. A. Millikan, at Fort Jones, Calif., and at the time of the mailing of said sealed envelope, aforesaid, there was then and there enclosed in said envelope a certain letter which said letter was and is as follows, to wit:

"Frank Menefee,	Robert J. Upton,
Pres. and Gen. Mgr.	Secretary
F. H. Gloyd	F. M. LeMonn
Treasurer	Gen. Sales Manager

UNITED STATES CASHIER CO.

Manufacturers.

Automatic Computing

Change-Making, Recording

Coin-Paying Machines.

Automatic Cashier	Visible Listing and
for Banks, Pay Rolls,	Adding Machine
etc.	Automatic Change-Computing
	Machine for Department and
	Retail Stores, etc.

Home Office, Lewis Building.

Portland, Oregon,

June 7, 1912.

Dr. A. A. Millikan,
Fort Jones, Calif.

Dear Sir:

Replying to your letter received today and also confirming our wire will say that I will give you a statement of the patents and applications owned and controlled by this company. You will notice we have designated them as case A, B, etc.: This for our convenience in reference to letters or telegrams to our attorneys in Washington. You will also notice that in Case A. and Case B. patents have been issued. These are assigned on the records of Washington direct to this company. Cases A. C.

and D. are at this time allowable. In other words the claims have been granted by the department and we have been duly notified to that effect and we can have the patents allowed and issued any time on payment of the final government fee of \$15 each. These cases we are holding unissued for reason that the life of the patents does not commence to run so long as they are unissued and we can also rewrite our claim broadening them as the machine develops so as to strengthen it in every respect and finally have issued a patent much broader in its *skope*.

In the other cases the applications are on file with perhaps one or two minor exceptions and have been regularly assigned, at the time application was filed, to this Company. To be absolutely explicit as to the ownership of the patents will say that the title to all of these patents and applications is in the United States Cashier Company; no contract existing that can in any manner forfeit them to any other person. Moreover, they are paid for in full at this time, with the exception of about \$25,000 on our Bilyeu contract which is not yet due. Non-payment of the amount due would not effect the company's title or right to the patents. We mention this to be explicit that no one has any claim upon our patents whatever, but of course the small balance unpaid will be

Dr. A. A. Milliken———#2.

readily taken care of and is not an embarrassing indebtedness against the Company at all.

The cases referred to are as follows:

Case A°

This application has resulted in Letters Patent No. 886, 307, issued to Thomas I. Potter, April 28, 1908, regularly assigned to the Company, and covers particularly a selective machanism of the type using a selector plate or plates traversing the path of movement of the ejecting devices, and controlling the operativeness or inoperativeness of the same. The patent does not limit us to handle controlling means, as we are at liberty to employ key mechanism instead.

Case A.

This application is directed to the original Bilyeu invention and especially the arrangement of parts including the selector, ejector and actuator devices which are used in an analogous arrangement in our latest machine.

Case B.

Letters Patent No. 985,135, issued to Thomas Bilyeu and William S. Overlin February 28, 1911, have resulted from this application and protects quite broadly a later embodiment of the selector mechanism comprising selectors which set the ejectors in operative position. Our new machines will employ the subject-matter of this patent quite fully as we have found it unnecessary to depart therefrom.

Case C.

This is an application of Messrs. Bilyeu, Overlin and Gridley, and is directed particularly to the special type of rotary actuator identically as employed in the Overlin computer. We have some very valuable claims in this application to said subject-matter, and furthermore, to the actuator mechanism as associated broadly with the printing mechanism and key release mechanism.

Case D.

This is an application by the same inventors as in case "C," and is really to a division of case "C," covering the printing mechanism embodying the reciprocable type bars and indexing means therefor. We adhere to this general idea in the white Cashier.

Dr. A. A. Millikan———#3

Case E.

This application is designed to cover the Bilyeu Change-Maker or Computer, a machine incorporating the selector principle of the machine of application, Case "B" but modified only to afford a computing or subtracting action.

Case F.

The street car machine is the subject-matter of this application and the claims are especially directed to the construction whereby the handle or actuator of the other machines is dispensed with and the keys are used to initially select and subsequently eject the coins by a very simple but extremely effective co-operation of the keys with the ejectors.

Case G.

This is an application by William S. Overlin to cover the bill paying *machanism* alone or as used in combination with a coin paying section, the mechanism being capable of handling the bills in flat condition necessary from a commercial standpoint.

Case H.

The machine of this application is the Overlin computer or change-maker and the mechanism covers computing means for mechanically subtracting or computing to eject coins representing the difference between the amount received and amount of purchase.

Case I.

This is the application for the White Bank Cashier in its completed commercial form and while the machine includes certain mechanisms of the several applications before enumerated in addition broad protection is being obtained for the idea of combining an adding section with a coin-paying section so that, if desired, the adding section may be used alone as an ordinary adding machine or may even be constructed and used as an adding machine without being attached or combined with a coin paying mechanism. I feel that this application is one of the most important of all our cases. While it will adhere in many respects to other applications granted or allowable, it will fully cover all of the principles of the machine in its final, developed commercial form. From our research, we know that the

principles of the design and construction of this machine particularly, will be fully protected in every respect. Furthermore, the design and mechanism used in this machine will control in all other machines placed upon the market by the company, especially the computing machine, so that the protection afforded by our application for patent, as well as the mechanical standardizing and development of the

Dr. A. A. Millikan———#4

machine will answer almost entirely in the completion of our other models.

Case K.

The general design of the money handling machine involving the relative positions of the coin receptacles, open money chute common to all of said receptacles, bank or banks of keys at the right of said receptacles and operating handle at the right extremity of the machine, is the subject-matter of this application.

Case L.

This application is directed to the special replenishing alarm associated with all of the receptacles and affording a signal to warn the operator of the machine when the supply of coins in the receptacle is diminished to a predetermined point. This alarm is used in the White Cashier but is being covered separately since it is adapted for application to any money handling machine of the general type of our cashier.

Case M.

This application is on our Currency Paying Machine, which is an improvement and practically speaking, new and original as affecting the handling of currency. Before taking this as the method of handing out paper we have had a search made by our attorneys at Washington and we are advised that we will be able to obtain the broadest protection upon this character of machine, it embodying an entirely new principle as applied to the handling of paper money, and the only method handling it which, in my opinion, would prove a commercial success. We have not had a description of this machine or the principle by which we expect to handle currency therefore, we beg to advise you that this machine will handle currency in flat condition, without any necessity of loading the machine except to place in the proper receptacle a package of bills just as they are found in the bank. They are lifted out on a pneumatic principle one by one as accurately and as rapidly as the Cashier Machine works in the handling of coin alone. Moreover, it will be what might be termed the upper deck of the machine so that it will not materially increase the size of the machine, but handle the paper over the coin tubes. In this way it will be so arranged that the operator can pay either coin or currency at will by means of a shift key engaging the currency or coin paying mechanism, as the case may be. Of course, the machine will be made to handle small change in coin, and it will operate to handle it and also the larger denominations in currency.

Dr. A. A. Millikan———#5

The foregoing will answer fully the questions asked in your letter and we presume that nothing further need be said by us with reference to the company's affairs, as we feel absolute confidence in Messrs. Hopson and Hunter and know they would not make any representations to you that is not borne out by the facts and both of them having been in Portland so they have personally seen our factory, etc. They have complete data and knowledge as to the progress we have made. However, we should be very glad indeed to answer any further questions you see fit to make.

Yours faithfully,

UNITED STATES CASHIER COMPANY,

Frank Menefee,

FM:E

President."

which said letter had theretofore and on June 7, 1912, at Portland, Oregon, been written and executed by the said defendant, Frank Menefee; with the intent then and there in the said defendant, Frank Menefee, that the said letter contained in the said envelope and the said envelope should be sent, transmitted and delivered by and through the post office establishment, of the United States to the said address at Fort Jones, California; and which said letter was then and there of and concerning the aforesaid scheme and artifice to defraud, which said scheme and artifice to defraud, the said defendants, Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter,

O. L. Hopson, P. E. Muraine and Oscar A. Campbell had therefore, as hereinabove alleged, conspired, combined and agreed to devise and to execute;

4. And the Grand Jurors, aforesaid, upon their oaths and affirmations, aforesaid, do further present, allege, find and charge:

That in pursuance and furtherance of the said unlawful conspiracy, combination, confederation and agreement, aforesaid, and to effect the object thereof, the defendant herein, Frank Menefee, did afterwards and on, to wit: the 30th day of January, 1913, at Portland, Oregon, and within the jurisdiction of this court, knowingly, unlawfully and feloniously place and deposit and cause to be placed and deposited in a post office and postal station of the United States post office establishment, to wit, the United States post office at Portland, Oregon, for mailing and delivery and with postage fully prepaid thereon, a certain sealed envelope then and there addressed to Mr. Jos. Hunter, at Reno, Nevada, and at the time of the mailing of said sealed envelope, aforesaid, there was then and there enclosed in said envelope a certain letter which said letter was and is as follows, to wit:

“January 30th, 1913.

Mr. Jos. Hunter,
Reno, Nevada.
Dear Sir:

We are trying to round out our stock selling as rapidly as possible. *The fact is we have deals on at \$30.00* which will amply take care of the Company's *treasury stock*, and we have to handle, in order to

keep the market clear, a quantity of stock for private parties, and we are trying to take off the market all we possibly can. We can handle this situation very nicely if we can rush up our miscellaneous sales in some way.

I can not put this proposition up to very many and do not want to except in isolated places where it won't interfere with other sales and our stock selling generally. You are one of perhaps two or three that we have working for us, that we can put this confidential proposition up to, and we would not put it up to you except that you are going to a new location where I think there will not be much communication between the stockholders there are other places. If you do not want to work the proposition in this way, all you have to do is to say so and go at it in the same old way that you have been doing.

What I want to propose is that you could work like you did in northern California last summer at \$20.00 per share, only at that rate we would have to realize \$15.00 per share, which would only leave you a commission of 25%. This advantage in the price would rush up the business so that you would make more money at that commission than at 30% insisting on selling at \$30.00 per share.

You understand if you work in this way that your subscriptions must be taken on the blanks that read Joseph Hunter, and your argument would be that the Company stock was practically all placed

and all provided for by contracts already made with a possibility of one or two failing and having to be sold to outside parties. With such a contingency no Company stock was to be had, but that you could sell a couple hundred shares or whatever amount you think proper to work on, and then sell it as long as you had sales, regardless of whether

#2/ To Jos. Hunter, 1/30/13

the amount runs out or not, and the stock you sell is either some of your previous sales at that price which your people have not been able to pay for, and which you can get by turning in the money quickly, or else that you got hold of a small block from a party that was hard up and had to realize some money, and in that way you were able to let them have the inside figure, unknown to the Company of course. As a matter of fact, this is a private matter and must not be considered as Company business.

I do not need to say more to you as you are so used to these situations, and will readily realize whether you had better work it this way or not, and if so on what plan you want to work. Whatever plan you do adopt if you go to working this way, write me fully personally, so I will know what to say if inquiries are made.

Yours faithfully,

FM:HM"

Frank Menefee."

which said letter had theretofore and on January 30, 1913, at Portland, Oregon, been written and executed by the said defendant, Frank Menefee; with the intent

then and there in the said defendant, Frank Menefee, that the said letter contained in the said envelope and the said envelope should be sent, transmitted and delivered by and through the post office establishment of the United States to the said addressee at Reno, Nevada; and which said letter was then and there of and concerning the aforesaid scheme and artifice to defraud, which said scheme and artifice to defraud, the said defendants, Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine, and Oscar A. Campbell, had theretofore, as hereinabove alleged, conspired, combined and agreed to devise and to execute;

5. And the Grand Jurors, aforesaid, upon their oaths and affirmations, aforesaid, do further present, allege, find and charge:

That in pursuance and furtherance of the said unlawful conspiracy, combination, confederation and agreement, aforesaid, and to effect the object thereof, the defendant herein, F. M. LeMonn, did afterwards and on, to wit, the 27th day of March, 1912, at Portland, Oregon, and within the jurisdiction of this court, knowingly, unlawfully and feloniously place and deposit and cause to be placed and deposited in a post office and postal station of the United States post office establishment, to wit, the United States post office at Portland, Oregon, for mailing and delivery and with postage fully prepaid thereon, a certain sealed envelope then and there addressed to Mr. L. H. Robinson, at Moorcroft, Wyoming, and at the time of the mailing of said sealed envelope, aforesaid, there was then and there enclosed in

said envelope a certain letter which said letter was and is as follows, to wit:

"Frank Menefee,	Robert J. Upton,
Pres. and Gen. Mgr.	Secretary
E. O. Genert,	F. M. LeMonn,
Asst. Gen. Sales Mgr.	Gen. Sales Manager

UNITED STATES CASHIER CO.

Manufacturers

Automatic Computing

Change-Making, Recording

Coin-Paying Machines.

Automatic Cashier	Visible Listing and
for Banks, Pay Rolls,	Adding Machine
etc.	Automatic Change-Computing
	Machine for Department and
	Retail Stores, etc.

Home Office, Lewis Building.

Portland, Oregon, 3/27/12.

Mr. L. H. Robinson,
Moorcroft, Wyo.

Dear Sir:—

We take pleasure in acknowledging due receipt through our Mr. B. F. Bonnewell of your subscription dated Mar. 4/12 for fifty shares of the capital stock of this Company at \$30.00 per share, total \$1500.00, together with payment on same of \$100.00 cash, \$400.00 in thirty days and \$1,000.00 on or before six months from date.

Your certificate will be delivered when final payment has been received. Make all future pay-

ments payable to the United States Cashier Company or B. F. Bonnewell.

For some time we have been operating our factory at Kenton full blast, and will be able to deliver our first machines within a very short time. We will turn them out in increasing numbers each month after the first machines are completed, so that by the latter part of the year we should have a sufficient number of commercial machines on the market to place us upon a substantial paying basis, and declare to the stockholders a reasonable dividend.

Thanking you for past and awaiting your future favors, we remain,

Yours very truly,

UNITED STATES CASHIER COMPANY,

F. M. LeMonn,

F.ML-HES

Sales-Manager."

which said letter had theretofore and on March 27, 1912, at Portland, Oregon, been written and executed by the said defendant, F. M. LeMonn; with the intent then and there in the said defendant, F. M. LeMonn, that the said letter contained in the said envelope and the said envelope should be sent, transmitted and delivered by and through the post office establishment of the United States to the said addressee at Moorcroft, Wyoming, and which said letter was then and there of and concerning the aforesaid scheme and artifice to defraud, which said scheme and artifice to defraud, the said defendants, Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E.

Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine, and Oscar A. Campbell, had theretofore, as hereinabove alleged, conspired, combined and agreed to devise and to execute;

6. And the Grand Jurors, aforesaid, upon their oaths and affirmations, aforesaid, do further present, allege, find and charge:

That in pursuance and furtherance of the said unlawful conspiracy, combination, confederation and agreement, aforesaid, and to effect the object thereof, the defendant herein, F. M. LeMonn, did afterwards and on, to wit, the 28th day of March, 1912, at Portland, Oregon, and within the jurisdiction of this court, knowingly, unlawfully and feloniously place and deposit and cause to be placed and deposited in a post office and postal station of the United States post office establishment, to wit, the United States post office at Portland, Oregon, for mailing and delivery and with postage fully prepaid thereon, a certain sealed envelope then and there addressed to Mr. J. J. Bauer, at San Francisco, California, and at the time of the mailing of said sealed envelope, aforesaid, there was then and there enclosed in said envelope a certain letter which said letter was and is as follows, to wit:

"Frank Menefee,	Robert J. Upton,
Pres. and Gen. Mgr.	Secretary
F. H. Gloyd,	F. M. LeMonn,
Treasurer	Gen. Sales Manager

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etc.	Automatic Change-Computing
	Machine for Department and
	Retail Stores, etc.

Home Office, Lewis Building.

Portland, Oregon,

March 28, 1912.

Mr. J. J. Bauer,
San Francisco, Calif.

Dear Sir:

We have your favor of the 26th and have carefully noted contents. We are sorry that we inadvertently failed to reply to your communication of the 7th inst.

We cannot see anything peculiar in the fact that brokers are offering 200 shares, or any part of sale, of this Company's stock at \$13.50, when you remember that the stock was selling at par, \$10 per share, up until December 12, 1910, and at \$11 up until February 1st, \$12½ up until July 1, 1912.

Where there are more than 3000 stockholders who have subscribed for practically, in round numbers, 100,000 shares, it is not likely, but is absolutely true, that some of them will become financially embarrassed and will have to offer for sale or trade, some, if not all of their property. When a part of this property is U. S. Cashier stock it is not to be wondered at that it gets into the brokers' hands and in many cases they are forced to sell for less than they paid. However, the broker can make a profit when he sells at \$13.50 if the earlier subscriber of this stock sells to him for the same price he paid, \$10, \$11, or \$12.50.

For instance, consider this matter personally and ask yourself the question: If you were hard up for money and had to have it on other deals in order to save your property or your business, which may represent your principle interest, you would likely begin trading or selling, even at a sacrifice, some of your other property which was not as necessary for your comfort or livelihood. We would see nothing strange in the fact that stock was offered through brokers even if at \$5 per share, unless it represented dissatisfaction on the part of the stockholder, and this reason for letting go of the stock has never been presented to our notice.

Mr. J. J. Bauer———#2

The stock is selling freely at \$30 per share and if the Company could legally, or believed it wise, to speculate in stock, we would buy up this broker's stock and sell at an enormous profit, but our reason

for offering stock to the public is simply and solely to enable us to get hold of the necessary funds to manufacture and place these machines on the market, and this Company has not deemed it wise to begin buying stock offered on the curb, no matter what the price may be. If you will talk with any curb broker you will find that he considers it a very healthy condition when he can get over par for stock in which he may be trading and he will only offer par and above because the Company's condition has been favorable enough to enable them to get a much higher price through their representatives who are eternally on the hunt for a prospective investor.

A stockholder's letter will be forwarded within a few days which will advise you that we have completed our Standard Commercial Bilyeu Automatic Cashier and that it has been working perfectly in every test devised for it. We are now manufacturing in commercial quantities and will be able to turn out machines from month to month in rapidly increasing numbers, until the Fall of the year when we believe we can turn out several hundred machines per month.

The orders we now have on hand and are taking from daily demonstrations will keep us busy for the next six to nine months to come, and we know we are entering a season of great prosperity. We believe the stockholders have reason to be congratulated upon becoming partners in this new industry.

Assuring you it will be our pleasure at all times to answer any and all questions concerning the Com-

pany and thanking you for past favors, we beg to remain,

Yours very truly,

UNITED STATES CASHIER COMPANY,

F. M. LeMonn,

FML:E

Sales-Manager."

which said letter had theretofore and on March 28, 1912, at Portland, Oregon, been written and executed by the said defendant, F. M. LeMonn; with the intent then and there in the said defendant, F. M. LeMonn, that the said letter contained in the said envelope and the said envelope should be sent, transmitted and delivered by and through the post office establishment of the United States to the said addressee at San Francisco, California; and which said letter was then and there of and concerning the aforesaid scheme and artifice to defraud, which said scheme and artifice to defraud, the said defendants, Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine, and Oscar A. Campbell, had theretofore, as hereinabove alleged, conspired, combined and agreed to device and to execute;

7. And the Grand Jurors, aforesaid, upon their oaths and affirmations, aforesaid, do further present, allege, find and charge:

That in pursuance and furtherance of the said unlawful conspiracy, combination, confederation and agreement, aforesaid, and to effect the object thereof, the defendant herein, Frank Menefee, did afterwards and on,

to wit, the 19th day of August, 1912, at Portland, Oregon, and within the jurisdiction of this court, knowingly, unlawfully and feloniously place and deposit and cause to be placed and deposited in a post office and postal station of the United States post office establishment, to wit, the United States post office at Portland, Oregon, for mailing and delivery and with postage fully prepaid thereon, a certain sealed envelope then and there addressed to Mr. H. T. Johnson, at Grand Forks, N. D., and at the time of the mailing of said sealed envelope, aforesaid, there was then and there enclosed in said envelope a certain letter which said letter was and is as follows, to wit:

“Frank Menefee,
Pres. and Gen. Mgr.

Robert J. Upton,
Secretary

F. H. Gloyd,

Treasurer

F. M. LeMonn,

Gen. Sales Manager

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Adding Machine

Automatic Change-Computing

Machine for Department and

Retail Stores, etc.

Home Office, Lewis Building.

Portland, Oregon,

August 19th, 1912.

Mr. H. T. Johnson,
Grand Forks, N. D.

Dear Sir:—

Replying to your letter of August 10th, in which you enclose one of the same date addressed to you signed by Mr. Frank B. Feethan, will say:—

As stated in the annual report, cases A° and B have resulted in letters patent being issued; in cases A, C and D, the patents are allowed, meaning that all of our claims have been allowed and that the issuance of the patents is being held up because of our not having paid the final government fee and not having asked for their issuance.

We have not done this because we can renew our application by re-writing the claim each year, thereby lengthening the life of the patent and enabling us to write into our original application many claims that will develop themselves as our standardizing and further development progresses.

In the other cases as indicated, the applications are filed, properly assigned to the Company by the inventors.

As to having had the records examined as to infringements, will say that our Attorney Mr. John F. Robb, has for some months past been devoting considerable of his time to the examination of the entire art of coin paying machines, particularly as adapted to the adding machine or combination, and his reports to us from time to time indicate that we

will be fully protected and that all of our applications will be reasonably free from any chances of infringement whatever on any other known patent in the art.

The adding machine art is old and we can not claim any basic protection but our mechanism or machine, as we might say, is worked out entirely in a different method from any known adding machine, and will form the basis of a patent on the mechanical construction of the machine.

#2 To H. T. J. 8/19/12.

Were we going into the adding machine field alone, we would have to expect competition from all existing adding machine companies, although we believe we could successfully compete with them, because of the simplicity of our machine, and the fact that it contains less parts and is more reliable, as well as performing certain offices and work that are not performed by the better known machines.

In the coin paying art, we are occupying a field practically new, in so far as any machine has been manufactured that would work in connection with the adding and listing device, and on this point and part of our machine, we are depending for our monopoly.

Our attorneys have advised us, as I stated in my report, that we have the fullest protection with reference to this machine, the reference being to case "I," and as stated, the mechanism and principle of this machine will control all of the other machines

we are placing on the market, and it will be found impracticable, if not impossible, to perform the work our machines will do, without going at it in a way so similiar to our machines that it will be an infringement.

This mechanism is quite fully covered in case B, which has already gone to issue, and the new applications are intended more to cover the re-designing and certain minor improvements, than to obtain the protection we need, as that is very fully covered by cases A, B and C, already issued or allowable.

We have had a special report from our Attorney with reference to the patent ability of our currency paying device, case M. We are advised that the principle we are applying with reference to the handling of currency, has never before been used in handling money, and that we can obtain protection therefor, and that there will be little or no likelihood of any previous patent or application.

The remark of Mr. Feethan that there is a great similarity between our machine and the Cash register is really not well founded in fact, inasmuch as the cash register has not attempted to do anything in the way of handling money. Its adding and listing devices are perhaps similiar to ours, but those things are old and our use of them will not conflict with them in any manner, all the protection they have being their particular mechanism, and perhaps very little in that regard on account of the age of the patents.

The cash register, as I have stated, does not attempt to combine with their listing and accounting features any device

#3. To H. T. J. 8/19/12/

whatever for the computing of change or the paying of money or change by mechanical means, that being done entirely by the individual or person operating the cash register.

With our machine, the patents cover the principles of having the machine automatically pay the money called for by the pressure of the keys, as well as add and list it. Also our computing machine application is directed to the handling of money, mechanically computing the difference between two amounts, and automatically paying the amount of money representing this difference, as well as adding and listing the amount tendered and the amount of the purchase.

This application with the protection afforded in cases A°, B and C, and the new application on the re-designed and standardized form of the cashier machine, case I, cover all of the principles of our machines, so that any other machine will be merely the re-embodiment of these principles with certain improvements or changes so as to make them better adapted to slightly different purposes.

In regard to litigation, will say that we have never had any intimation of litigation of any kind with reference to any of our patents and have not

had any one question the validity of any of our claims.

There is still approximately twenty thousand shares, par value of \$200,000, stock in the Treasury of the Company, a portion of which is represented by subscriptions that we are cancelling from time to time on account of inability, for some financial reason, of the subscribers to make their payments.

The stock that is now being sold is Treasury stock of the Company, and the entire amount for which the sale is made goes in the Treasury of the Company, less the selling agent's commission. No person receives any extra benefit or rake off out of the premium for which the stock is sold above par value.

Trusting that this will answer your questions, but assuring you that if you desire any further information, we will be more than pleased to write you further, we remain,

Yours faithfully,

Frank Menefee,

FM:MM

President.

which said letter had theretofore and on August 19, 1912, at Portland, Oregon, been written and executed by the said defendant, Frank Menefee, with the intent then and there in the said defendant, Frank Menefee, that the said letter contained in the said envelope and the said envelope should be sent, transmitted and delivered by and through the post office establishment of the United States to the said addressee at Grand Forks, North

Dakota; which said letter was then and thereof and concerning the aforesaid scheme and artifice to defraud, which said scheme and artifice to defraud, the said defendants, Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine, and Oscar A. Campbell, had theretofore as hereinabove alleged, conspired, combined and agreed to devise and to execute;

8. And the Grand Jurors, aforesaid, upon their oaths and affirmations, aforesaid, do further present, allege, find and charge:

That in pursuance and furtherance of the said unlawful conspiracy, combination, confederation and agreement, aforesaid, and to effect the object thereof, the defendant herein, F. M. LeMonn, did afterwards and on, to wit, the 29th day of February, 1912, at Portland, Oregon, and within the jurisdiction of this court, knowingly, unlawfully and feloniously place and deposit and cause to be placed and deposited in a post office and postal station of the United States post office establishment, to wit, the United States post office at Portland, Oregon, for mailing and delivery and with postage fully prepaid thereon, a certain sealed envelope then and there addressed to Mrs. A. M. Armstrong, at 809 Wright and Callender Bld'g, Los Angeles, California, and at the time of the mailing of said sealed envelope, aforesaid, there was then and there enclosed in said envelope a certain letter which said letter was and is as follows, to wit:

"Feb. 29, 1912.

Mrs. A. M. Armstrong,
809 Wright & Callender Bld'g.,
Los Angeles, Calif.

Dear Mrs. Armstrong:

Your night letter of yesterday received as follows:

'Englishman member of English Syndicate here for class A investments wants to buy right to manufacture machines England, Germany and France or England alone. If we have foreign protection can have sale completed forty eight hours by cable. Financial standing established in Los Angeles. Desires immediate reply. Other deals pending.'

We have replied to you as follows:

'Foreign rights of machines protected but will be necessary for personal interview with party in Portland. If sufficiently interested to come to Portland kindly advise by wire.'

We don't think there could be any good come from any correspondence of any party over such a serious matter when a ride of a day and one half would bring us together and matters could be taken care of in so much better way, as to warrant a personal interview; hence we feel that as we stated in our wire, these matters must be taken up at the home office personally, as we are not sufficiently interested to attempt same by correspondence, inasmuch as it would, in all probability result in anything but a satisfactory manner.

Mrs. A. M. Armstrong——#2.

We want to thank you however for the interest you have taken in the matter and for calling our attention to same and if the party is serious in regard to this matter we will be only too pleased to talk the matter over, as the foreign rights are bound to bring someone much prosperity.

Thanking you for past and awaiting your further favors, we remain,

Yours very truly,

UNITED STATES CASHIER COMPANY,

F. M. LeMonn,

FML:E

Sales-Manager."

which said letter had theretofore and on February 29, 1912, been written and executed by the said defendant F. M. LeMonn; with the intent then and there in the said defendant, F. M. LeMonn, that the said letter contained in the said envelope and the said envelope should be sent, transmitted and delivered by and through the post office establishment of the United States to the said addressee at Los Angeles, California; and which said letter was then and there of and concerning the aforesaid scheme and artifice to defraud, which said scheme and artifice to defraud, the said defendants, Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine, and Oscar A. Campbell, had theretofore as hereinabove alleged, conspired, combined and agreed to devise and to execute;

9. And the Grand Jurors, aforesaid, upon their oaths and affirmations, aforesaid, do further present, allege, find and charge:

That in pursuance and furtherance of the said unlawful conspiracy, combination, confederation and agreement, aforesaid, and to effect the object thereof, the defendant herein, Frank Menefee, did afterwards and on, to wit, the 24th day of July, 1912, at Portland, Oregon, and within the jurisdiction of this court, knowingly, unlawfully and feloniously place and deposit and cause to be placed and deposited in a post office and postal station of the United States post office establishment, to wit, the United States post office at Portland, Oregon, for mailing and delivery and with postage fully prepaid thereon, a certain sealed envelope then and there addressed to Mr. J. W. Brett, at 727 9th Avenue, Lewiston, Idaho, and at the time of the mailing of said sealed envelope, aforesaid, there was then and there enclosed in said envelope a certain letter which said letter was and is as follows, to wit:

"Frank Menefee,
Pres. and Gen. Mgr.

Robert J. Upton,
Secretary

F. H. Gloyd, F. M. LeMonn,
Treasurer Gen. Sales Manager

UNITED STATES CASHIER CO.

Manufacturers

Automatic Computing

Change-Making, Recording

Coin-Paying Machines.

Automatic Cashier Visible Listing and
for Banks, Pay Rolls, Adding Machine
etc. Automatic Change-Computing
 Machine for Department and
 Retail Stores, etc.

Home Office, Lewis Building.

Portland, Oregon,

July 24, 1912.

Mr. J. W. Brett,

727 9th Avenue,

Lewiston, Idaho.

Dear Sir:—

Your letter of the 18th instant in regard to purchase of stock in our Company at less than par is duly received. Your letter asks for the personal advice of the writer whether you should buy this stock or not, and you state that you have a little money, but have a family to support and are getting along in years.

You must realize that to advise you in a matter of this kind under these circumstances is serious, and if I am at all conscientious, which I certainly am, I could not under any circumstances advise you where I thought there could be the least possible chance of your falling down on the investment.

The stock that is offered you is some stock that has been traded around no doubt and taken over by parties ready to do anything for the sake of realizing a little ready money. So far as we have found no stock we have sold for cash has ever gone on the market at less than the price paid for it, at least

with very rare exceptions where parties were absolutely compelled to have a little ready cash.

The question is also often asked, why, if we can buy this stock so cheaply and our price is \$30. per share, at which we are selling quantities of stock, do we not buy up the cheap broker stock. The answer to this is simply that the company has no legal right to divert its funds in order to buy up and speculate in its own stock. One or two of the other directors and I have purchased some of the cheaper stock which we are holding, but of course our funds are necessarily limited and we can only buy up what we can pay for in cash, and really, we have bought until we have used every dollar of ready cash we are able to let go of. I have paid many thousands of dollars since my connection with the company buying up stock in this way, and still buy a little occasionally when I have the funds on hands with which to handle it.

Page 2.

Now, in answer to your question, will say that the time was a year or a year and a half ago when the future of the company was uncertain in that it was an open question still as to our ability to finance the company and also as to the quality of the product we could turn out for our stockholders. I had great confidence in our future at that time and even then advised my own family and friends to invest money in the proposition which they could not afford to lose.

At this time the company's affairs present an altogether difference aspect. We have ourselves so thoroughly entrenched financially that beyond any question we can place our machines on the market commercially. I have investigated more thoroughly the patent situation and am thoroughly convinced that no complications in that line can arise whereby we will be seriously, if at all, handicapped in placing our machines on the market. We have proven to our complete satisfaction that we have a mechanical ability surrounding us than can handle any mechanical proposition we desire to put up to them. They have demonstrated their ability by the perfecting and standardizing of our Bank Cashier, for which we are now making final dies and which we expect to have on the market within the present year at the outside; when I say on the market I mean in quantities sufficient to return a substantial revenue to the company each month in the way of profits.

In addition to this, we have developed so that we know we will make a commercial success of it, a Currency machine for our machines. We have developed the Computing Machine so that it is without question a success mechanically and it will be one of the best sellers we will put on the market far outrivaling the sales of the Cashier Machine. We are also developing and will place on the market our Lightning Change Maker particularly equipped for street-car service and also for sale of tickets at five and ten cent theaters, and also with a little

changing can make it adaptable for use in small cigar stores, etc. This machine as we can and will put it on the market will be a ready seller and find a ready market all over the United States.

With our success as to our ability to place these machines on the market the future of the company can scarcely be estimated. It sounds almost like dreaming when we tell of the sales we know we can make and the profit that will arise from it, and I feel like I am conservative when I say to you that with all of our models on the market and the factory running at sufficient capacity to anywhere near supply the demand our stock should return not less than from 50% to 100% on the par value. This is very conservative.

We have our factory running employing now about fifty men and have it fully equipped with machinery, everything being paid for to the minute. In addition to this we have our old factory or development shop in which our first models were made,

Page 3,

still running on experimental and development work on the different types of machines we are expecting to put on the market.

In conclusion I will only say that the future of this company and its prospects I have outlined above are given to you absolutely in good faith with full consciousness of the seriousness of the advice

you are calling upon me to give you, and I certainly consider if you get the opportunity to buy any of this stock at the price you mention, you are passing up a "snap" if you do not buy it to the full extent of your financial ability.

You have no doubt had our letters and literature from time to time, but if you have not received them, will be glad to mail them to you if you will advise us.

Yours faithfully,

UNITED STATES CASHIER COMPANY,

Frank Menefee,

FM-HG

President."

which said letter had theretofore and on July 24, 1912, been written and executed by the said defendant, Frank Menefee; with the intent then and there in the said defendant, Frank Menefee, that the said letter contained in the said envelope and the said envelope should be sent, transmitted and delivered by and through the post office establishment of the United States to the said addressee at Lewiston, Idaho; and which said letter was then and there of and concerning the aforesaid scheme and artifice to defraud, which said scheme and artifice to defraud, the said defendants, Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine, and Oscar A. Campbell, had theretofore, as hereinabove alleged, conspired, combined, and agreed to devise and to execute;

10. And the Grand Jurors, aforesaid, upon their oaths and affirmations, aforesaid, do further present, allege, find and charge:

That in pursuance and furtherance of the said unlawful conspiracy, combination, confederation and agreement, aforesaid, and to effect the object thereof, the defendant herein, Frank Menefee, did afterwards and on, to wit, the 5th day of March, 1912, at Portland, Oregon, and within the jurisdiction of this court, knowingly, unlawfully and feloniously place and deposit and cause to be placed and deposited in a post office and postal station of the United States post office establishment, to wit, the United States post office at Portland, Oregon, for mailing and delivery and with postage fully prepaid thereon, a certain sealed envelope then and there addressed to Mr. John Marshall, at Harney, Oregon, and at the time of the mailing of said sealed envelope, aforesaid, there was then and there enclosed in said envelope a certain letter which said letter was and is as follows, to wit:

“Frank Menefee,
Pres. and Gen. Mgr.

Robert J. Upton,
Secretary

F. H. Gloyd,

F. M. LeMonn,

Treasurer

Gen. Sales Manager

UNITED STATES CASHIER CO.

Manufacturers

Automatic Computing

Change-Making, Recording

Coin-Paying Machines.

Automatic Cashier Visible Listing and
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etc. Automatic Change-Computing
 Machine for Department and
 Retail Stores, etc.

Home Office, Lewis Building.

Portland, Oregon,

March 5, 1912.

Mr. John Marshall,
Harney, Oregon.

Dear Mr. Marshall:

Your favor of some days ago was inadvertently mislaid hence we beg to apologize for not replying earlier to same.

We forwarded you, on or about Feb. 17th, our regular stockholders letter and for fear that same was mis-carried are enclosing another herewith, which will acquaint you with the progress we have been making to date, also that we expect the First Standard Commercial Automatic Cashier to leave the Factory within a few days. This machine has been assembled and doing its work in a most praiseworthy manner, but we want to continue to test it out for a week or ten days yet so that we will be sure that when it leaves the factory there can be no possibility of an error in any transaction it may be called on to make.

The resale stock is selling freely at \$30 per share and as these subscriptions represent those that we cancelled on account of the subscribers being in arrears with payments and make an immense profit

over the first or early selling price and we have confidence that the last few hundred shares to be sold will not be offered at less than \$50. per share.

Now that our machines are practically ready for the market we have every reason to expect a season of great possibility as we have many orders now on our books and have orders coming in almost daily from the most unexpected sources, as well as many of them being entirely unsolicited by us and this rush of orders looks as though it will take us six months or more to catch up with the demand that we now know exists for these machines.

Hoping and believing that the progress will be so rapid from now on that it will please the most critical stockholder and awaiting your further favors, we remain,

Yours very truly,

Frank Menefee,

FM:E

President."

which said letter had theretofore and on March 5, 1912, been written and executed by the said defendant, Frank Menefee; with the intent then and there in the said defendant, Frank Menefee, that the said letter contained in the said envelope and the said envelope should be sent, transmitted and delivered by and through the post office establishment of the United States to the said addressee at Harney, Oregon; and which said letter was then and there of and concerning the aforesaid scheme and artifice to defraud, which said scheme and artifice to defraud, the said defendants, Frank Menefee, F. M. LeMonn,

Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine, and Oscar A. Campbell had theretofore, as hereinabove alleged, conspired, combined, and agreed to devise and to execute;

11. And the Grand Jurors, aforesaid, upon their oaths and affirmations, aforesaid, do further present, allege, find, and charge:

That in pursuance and furtherance of the said unlawful conspiracy, combination, confederation and agreement, aforesaid, and to effect the object thereof, the said defendant herein, Frank Menefee, did afterwards and on, to wit, the 5th day of March, 1912, at Portland, Oregon, and within the jurisdiction of this court, knowingly, unlawfully and feloniously place and deposit and cause to be placed and deposited in a post office and postal station of the United States post office establishment, to wit, the United States post office at Portland, Oregon, for mailing and delivery and with postage fully prepaid thereon, a certain sealed envelope then and there addressed to Mr. John Marshall, at Harney, Oregon, and at the time of the mailing of said envelope, aforesaid, there was then and there enclosed in said envelope a certain letter which said letter was and is as follows, to wit:

"Frank Menefee,	Robert J. Upton,
Pres. and Gen. Mgr.	Secretary
F. H. Gloyd,	F. M. LeMonn,
Treasurer	Gen. Sales Manager

UNITED STATES CASHIER CO.

Manufacturers

Automatic Computing
Change-Making, Recording
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Automatic Cashier	Visible Listing and
for Banks, Pay Rolls,	Adding Machine
etc.	Automatic Change-Computing
	Machine for Department and
	Retail Stores, etc.

Home Office, Lewis Building.

Portland, Oregon,
February 17, 1912.

TO STOCKHOLDERS:

We are pleased to advise, as you will note above, that on February 1st Mr. F. H. Gloyd became actively identified with this Company as Treasurer, and we have been the recipient of many compliments from bankers and business men of the Pacific Northwest commending Mr. Gloyd as a Banker and Business Man and congratulating this Company on securing his services in handling the financial department of this Company. He has been one of our stockholders for many months past and last year visited with us, looking into the Management of the Company as well as our Manufacturing Depart-

ment and this gave him such confidence in our future prospects that he accepted our proposition to become Treasurer and from now on will devote his entire time and attention to our business.

In order to take up his duties with us, Mr. Gloyd tendered his resignation as President and Manager of a chain of four banks, viz: The State Bank of Prosser, Union Bank of Granger, Grand View State Bank of Grandview, and the Kiona State Bank of Kiona, all in the Yakima Valley, Washington. However, at the present time he is yet the nominal President of the last three named banks as he is being retained as the President only until such time as the directors can elect new Presidents. Previous to his fifteen years' banking experience, he was the first auditor of Benton County, Wash., and for a number of years auditor of Pierce County, Wash., of which Tacoma is the metropolitan city.

You will readily appreciate that no business man holding such responsible positions as Mr. Gloyd held would leave same to go with any corporation if he had any doubt as to his new connection being other than that which offered most substantial promotion, not only for the present, but for all future time; hence we may be excused for taking some pride in making this announcement.

We also desire to announce most substantial additions to our Mechanical Staff. Since the first of the year we have secured a dozen mechanical ex-

perts direct from the Burroughs Adding Machine Co.'s plant in Detroit, which means that we now have fifteen men of the highest class designers, developers and mechanics from that great manufacturing company. We also have many high class mechanics who have been for years with the National Cash Register Co. of Dayton, and other equally as well known specialty manufacturing plants.

#2

There can be no question but with the addition of many thousands of dollars worth of new machinery which has been installed since January 1st, that today this Company is in a position to manufacture most successfully and turn out as good a product as any of these eastern plants which have been established for many years. Our factory payroll now amounts to between \$4000 and \$5000 per month, all of which is being expended along the line of manufacturing our first lot of Bilyeu Automatic Cashiers and Adding Machines.

Our business has already begun to expand to such an extent that we needed the room occupied by our Woodworking Department in order to give additional space for heavy machinery on the first floor; hence we have just completed a separate building into which we have transferred our Woodworking Department and are now ready to let the contract for the new addition to accommodate the Forge or Hardening Department.

The first commercial Automatic Cashier, as previously advised, will be finished and ready to leave the factory by the latter part of this month, which means that we are now practically ready to market our machines. Our salesmen are beginning training to take up the sale of these machines, as the stock selling campaign is practically at an end and the only stock that we are offering is that which has been released by cancelled subscriptions which were made many months ago and not settled for according to contract. As the stock is now selling freely at \$30 per share, you may readily understand that the Company is making a handsome profit on these resales.

After paying every obligation of the Company, including factory and equipment and all development expenses up to the time when our machines are ready for the market, we will still be able to provide a Manufacturing Fund of not less than \$200,000. This will be ample to continue the manufacture of the machines and place them on the market until such time as the proceeds from the sale of the machines will be returning a substantial profit to the Company.

We feel if you have carefully read the above you will agree with us and the experts who have visited our factory, that we have made most substantial progress considering the quality of workmanship and improvements we have made on our Automatic Cashier. It is no exaggeration to state that we have advanced the manufacture of these first com-

mercial machines more rapidly and successfully than has heretofore been either accomplished or attempted by any of the well established manufacturing plants when they have placed a new device on the market.

Hoping that we have your hearty support in the future as we have had in the past, we beg to remain,

Very truly yours,

UNITED STATES CASHIER COMPANY,

Frank Menefee,

President."

which said letter had theretofore and on February 17, 1912, at Portland, Oregon, been written and executed by the said defendant, Frank Menefee; with the intent then and there in the said defendant, Frank Menefee, that the said letter contained in the said envelope and the said envelope should be sent, transmitted and delivered by and through the post office establishment of the United States to the said addressee at Harney, Oregon; and which said letter was then and there of and concerning the aforesaid scheme and artifice to defraud, which said scheme and artifice to defraud, the said defendants Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine, and Oscar A. Campbell, had theretofore, as hereinabove alleged, conspired, combined and agreed to devise and to execute;

12. And the Grand Jurors, aforesaid, upon their oaths, and affirmations, aforesaid, do further present, allege, find and charge:

That in pursuance and furtherance of the said unlawful conspiracy, combination, confederation and agreement, aforesaid, and to effect the object thereof, the defendant herein, F. M. LeMonn, did afterwards, and on, to wit, the 8th day of April, 1912, at Portland, Oregon, and within the jurisdiction of this court, knowingly, unlawfully and feloniously place and deposit and cause to be placed and deposited in a post office and postal station of the United States post office establishment, to wit, the United States post office at Portland, Oregon, for mailing and delivery and with postage fully prepaid thereon, a certain sealed envelope then and there addressed to Mr. L. H. Robinson, at Moorcroft, Wyoming, and at the time of the mailing of said sealed envelope, aforesaid, there was then and there enclosed in said envelope a certain letter which said letter was and is as follows, to wit:

“Portland, Oregon, April 8, 1912.

TO STOCKHOLDERS:

At last we are able to announce that our Standard Commercial “Bilyeu” Automatic Cashier has been completed and is working perfectly in every test suggested or devised for it. This feat of re-designing and standardizing the machine has been accomplished in much less time than has ever been done by any of the old established manufacturing companies. The demonstrating model of our Automatic Cashier (which is the only one we have shown to the stockholders when soliciting their financial support) has a keyboard of four rows or banks and

its capacity for paying and listing is from one cent to \$99.99. In addition to the above the only work this model performed was that of making change for \$1, \$5, \$10 and \$20.

Comparing this demonstrating model with the Standard Commercial Machine, which is now finished, you will be able to at least partially understand what a tremendous and difficult task has been before us. The work the redesigned machine performs is as follows:

1st—Pays any amount from one cent to \$200.00.

2nd—Prints an instantaneous, visible and permanent record on the recording tape of any amount paid out or listed from one cent to \$9999.99.

3rd—Gives a visible total of each amount as paid, and also prints on the recording tape sub-totals and grand totals at will.

4th—Prints the amount paid on the face of the check by means of a duplicate printing device.

5th—Makes change for \$1, \$5, \$10 and \$20 by using one key only; the change given for each being the most serviceable—even down to a nickel for streetcar fare.

6th—Has nine denominational keys, permitting the operator to pay any number of any coin at will, or to make change in this way for any arbitrary amount desired without disturbing the keyboard or previous totals.

7th—Has removable coin-receptacles permitting storing of same in vault without unloading the coin; also permitting more than one cashier to use the machine by having his own change or funds in separate coin-receptacles.

8th—Signal bell rings when any coin tube is becoming depleted (but not empty) thus enabling the operator to replenish same before a false transaction can be made.

9th—The Cashier may be used as a visible adding and listing machine, without reference as to paying money, by depressing a shift key which disengages the paying mechanism, allowing adding and listing without removing the coin-receptacles.

If the operator has paid out \$5750.10 and then desires to add or list a number of checks, without paying any money, all that is necessary is to depress the total key, which would print a permanent record on the tape of the amount paid out and also clear the totaler. He would then depress the non-pay key and add or list as many transactions as he desired and total the same. To again make payments he would simply depress the keys representing the amount originally paid out (5750.10) as shown by the printed total and pull the lever which would re-read this amount into the totaler, without ejecting the same, and then release the non-pay key and the machine is again ready to pay, just as before adding or listing the checks.

This machine has a flexible keyboard permitting the correction of an error in any one row or bank of keys without resorting to the use of an error key, and is also equipped with a repeat key to be used when the operator desires to make duplicate transactions in paying, listing or adding. We can manufacture larger models which will pay up to \$1000 if any Bank or Pay Master desires same, although the hundreds of demonstrations we have made to the leading Bankers and Pay Masters has convinced us that there will be very few, if any, required to pay more than \$200.00 in coin, as they state that 95% of all the checks cashed are less than \$100 each.

Having finished the re-designing and standardizing, all our work is now devoted to manufacturing this Cashier, and, as we have a great number of parts ready for assembling, we are now practically ready for the market in the way of taking orders and making deliveries. We have more orders on hand than we will be able to fill in the next six months, and orders are coming in continually at a rapid rate.

Our stock selling campaign is practically at a close but in order to retain our splendid selling force until the machines are ready for the market, we are using them in the re-sale of stock previously subscribed but not settled for. This re-sale stock, subscribed for at a much lower figure than at the present price of \$30 per share, gives a handsome profit to the Company. Our financing, as you know, has been most successful and the substantial subscrip-

tions will furnish us ample funds for the manufacture and sale of the machines until the proceeds from same will take care of all future needs. Many of the heavy stockholders who have visited the factory from time to time are unanimous in their praise of the Management for being able to construct a machine with such wonderful utility and perfect mechanism in such a short length of time, although we know this work of redesigning and standardizing has severely taxed the patients of many of our shareholders who have not had the privilege of visiting the factory and seeing the progress made.

We are enclosing herewith a page of this month's issue of the "Pacific Banker" and you will find thereon the impression which our factory and machines have made upon Mr. Lydell Baker, the editor of this, the only exclusive banking and financial paper of the Pacific-Northwest. A careful reading of what this keen business man thinks of this Company and its product after having made most thorough investigation and tests is convincing that this Company is not only destined to make History for Portland, but has entered upon an epoch of great earnings for the shareholders who have been fortunate enough to secure stock in this enterprise.

We have been favored with a visit to our general offices and factory by a great number of both Portland and out-of-town shareholders, and as many of you are either manufacturers or have visited other manufacturing plants, we earnestly request each

and every one of you to make mental note of the things you see and write us on any subject or thing you observe that you believe could in any way be for the betterment of our Company and product.

Yours very truly,

UNITED STATES CASHIER COMPANY,

By F. M. LeMonn, Sales Mgr."

which said letter had theretofore and on April 8, 1912, at Portland, Oregon, been written and executed by the said defendant, F. M. LeMonn; with the intent then and there in the said defendant, F. M. LeMonn, that the said letter contained in the said envelope and the said envelope should be sent, transmitted and delivered by and through the postoffice establishment of the United States to the said addressee at Moorcroft, Wyoming; and which said letter was then and there of and concerning the aforesaid scheme and artifice to defraud, which said scheme and artifice to defraud, the said defendants Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine, and Oscar A. Campbell, had theretofore, as hereinabove alleged, conspired, combined and agreed to devise and to execute;

13. And the Grand Jurors, aforesaid, upon their oaths and affirmations, aforesaid, do further present, allege, find and charge:

That in pursuance and furtherance of the said unlawful conspiracy, combination, confederation and agreement, aforesaid, and to effect the object thereof, the de-

fendant herein F. M. LeMonn, did afterwards and on, to-wit, the 7th day of April, 1912, at Portland, Oregon, and within the jurisdiction of this court, knowingly, unlawfully and feloniously place and deposit and cause to be placed and deposited in a post office and postal station of the United States postoffice establishment, towit, the United States post office at Portland, Oregon, for mailing and delivery and with postage fully prepaid thereon, a certain sealed envelope then and there addressed to Mr. B. F. Bonnewell, at Northern Hotel, Billings, Montana, and at the time of the mailing of said sealed envelope, aforeasid, there was then and there enclosed in said envelope a certain letter which said letter was and is as follows, towit:

“April 7, 1912.

Mr. B. F. Bennewell,
Northern Hotel,
Billings, Mont.

My Dear Bonnewell:

We are sending you herewith a letter which we are mailing to all the stockholders today and would ask you to read same carefully so that you will know just what we are saying to them and also be able to present the Company's affairs in such a manner that no one can doubt our sincerity regarding the progress we are making.

We are especially pleased to call your attention to the last page of this month's issue of the "Pacific Banker" as you will find thereon a writeup on our wonderful machines and the factory by Mr. Lydell Baker, the managing editor, to whom the writer had

the pleasure and privilege of showing the machines and factory for the best part of two days last week.

This writeup should be invaluable to you as a canvassing document. If you read it carefully and inform your prospective investor that the "Pacific Banker" is a weekly periodical, going to all the bankers of the Pacific Northwest, inasmuch as it is the only banking paper published on the Coast and the editor, Mr. Lydell Baker, is a keen business man who of course keeps in touch with the financial interests and doings of the entire Pacific Coast, we believe the editor's philosophizing of the fame that will naturally come to Portland because of its being the home of the U. S. Cashier Company is not overdue and is entirely within both the possibility and probability of the very near future.

This is in no sense an advertisement, as no editor is going to go on record in this manner and jeopardize his position in the business world for an insignificant sum which would be required to pay for the space devoted to this article. We could have taken the editor out to our factory many months ago and have had this writeup of our industry appear in this valued periodical but we preferred to wait until such time as a careful investigation by this keen business man could

Mr. B. F. Bonnewell—#2

be nothing else but a great boost to this Company, both financially and from a manufacturing point of view, as could only be evidenced

by a visit to our factory and careful examination of its equipment, and to see this redesigned Standard Commercial Automatic Cashier in actual work. Mr. Baker had this machine demonstrated for him most thoroughly as we put it to every test that he could possibly think of and in each and every particular it worked perfectly—in every instance paying out the proper amount of coin, giving an instantaneous visible and *perment* record, printing the amount on face of check, adding same to the previous total, printing sub-totals and totals at will, repeating the same transaction as often as desired by depressing the repeat key and then by the use of the shift key or non-pay key, adding and listing and sub-totaling the same at will, without reference to the paying out of money.

This writeup surely cannot help but enable you to close some business the very day that you receive it and I mean by that, some business you were unable to close and perhaps felt was lost or lost until some future time. If you will but take this "Pacific Banker" with you again call upon some of these prospects and give as a reason, that you want him to see this splendid writeup by a disinterested party and the only banking paper of the Pacific Northwest, so that your prospective investor will have that verification from an expert unselfish source it should convince him that he is making a mistake to delay this matter a single day.

It is a positive fact that if you are to participate in the prosperity that should come to each of our

representatives in this closing campaign of \$30 stock, you should use your hand to the best advantage as well as put forth the greatest possible amount of energy and effort, as the advance to \$50 may take place almost any day and without any previous notice.

Hoping our efforts here at the office, in the way of this writeup, will prove not only a boom to us with the banking fraternity who will use our machines but will also be of great value to you in closing business, we beg to remain,

Yours very truly,

UNITED STATES CASHIER COMPANY,

F. M. LeMonn,

FML:E

Sales-Mgr."

which said letter had theretofore and on April 7, 1912, at Portland, Oregon, been written and executed by the said defendant, F. M. LeMonn, with the intent then and there in the said defendant, F. M. LeMonn, that the said letter contained in the said envelope and the said envelope should be sent, transmitted and delivered by and through the post office establishment of the United States to the said addressee at Billings, Montana; and which said letter was then and there of and concerning the aforesaid scheme and artifice to defraud, which said scheme and artifice to defraud, the said defendants, Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine and Oscar A. Campbell,

had theretofore, as hereinabove alleged, conspired, combined and agreed to devise and to execute;

14. And the Grand Jurors, aforesaid, upon their oaths and affirmations, aforesaid, do further present, allege, find and charge:

That in pursuance and furtherance of said unlawful conspiracy, combination, confederation and agreement, aforesaid, to effect the object thereof, the defendant, F. M. LeMonn, afterwards and on, towit, the 27th day of August, 1912, having theretofore received from the defendant B. F. Bonnewell, a telegram of which the following is a true and correct copy:

“NIGHT LETTER
THE WESTERN UNION TELEGRAPH
COMPANY

Aug. 1912.

Gillette Wyo 26
U. S. Cashier Co
708 Lewis Bldg.
Portland, Ore

Can you furnish us with two hundred more shares to sell answer by wire kindly phone my wife to write me to Sheridan care Great Western Hotel as I leave here Thursday

B. F. Bonnell.”

did at Portland, and within the State and District of Oregon, execute and cause to be transmitted, sent and telegraphed over and by means of the wires of the West-

ern Union Telegraph Company, a certain telegram to the said B. F. Bonnewell, of which the following is a full, true and correct copy, towit:

**"THE WESTERN UNION TELEGRAPH
COMPANY**

August 27, 1912.

B. F. Bonnewell,
Gillette, Wyo.

Received wire. Allotting you two hundred more shares for cash.

United States Cashier Co.

FML:E
CHG"

with the intent then and there in the said defendant, F. M. LeMonn, that the said telegram should be sent, transmitted and delivered to the said defendant, B. F. Bonnewell, by the said The Western Union Telegraph Company; said telegram was then and there of and concerning the aforesaid scheme and artifice to defraud, which said scheme and artifice to defraud, the defendants Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine and Oscar A. Campbell, had theretofore as hereinabove alleged, conspired, combined, confederated and agreed to devise and to execute;

15. And the Grand Jurors, aforesaid, upon their oaths and affirmations, aforesaid, do further present, allege, find and charge:

That in pursuance and furtherance of said unlawful conspiracy, combination, confederation and agreement, aforesaid, to effect the object thereof, the defendant, Frank Menefee, afterwards and on, towit, the 19th day of May, 1912, having theretofore received from the defendant, B. F. Bonnewell, a telegram, of which the following is a true and correct copy:

“DAY LETTER
THE WESTERN UNION TELEGRAPH
COMPANY

Deer Lodge, Mont. May 19th, 1912.

Frank Menefee,

708 Lewis Bldg.,

Portland, Ore.

Wire Paul Dunban Big Timber, Montana, Wm. Bonnewell, Sheridan, Wyoming and myself here all care Hotel closing telegram and about stock advancing send them night letters tonight if you can.

1105 AM

B. F. Bonnewell.”

did at Portland, and within the State and District of Oregon, execute and cause to be transmitted, sent and telegraphed over and by means of the wires of the Western Union Telegraph Company, a certain telegram to the said B. F. Bonnewell, of which the following is a full, true and correct copy, towit:

"NIGHT LETTER
THE WESTERN UNION TELEGRAPH
COMPANY

May 19, 1912.

To B. F. Bonnewell,
Deer Lodge, Montana.

Stock allotted practically exhausts amount at thirty and deals pending when closed will more than cover. Close all business and report as you go. May have to raise price to fifty at any time. Directors meeting Tuesday night.

United States Cashier Co."

Chg.

with the intent then and there in the said defendant, Frank Menefee, that the said telegram should be sent, transmitted and delivered to the said defendant, B. F. Bonnewell, by the said The Western Union Telegraph Company; said telegram was then and there of and concerning the aforesaid scheme and artifice to defraud, which said scheme and artifice to defraud, the defendants, Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine, and Oscar A. Campbell, had theretofore as hereinabove alleged, conspired, combined, confederated and agreed to devise and to execute:

16. And the Grand Jurors, aforesaid, upon their oaths and affirmations, aforesaid, do further present, allege, find and charge:

That in pursuance and furtherance of said unlawful conspiracy, combination, confederation and agreement, aforesaid, and to effect the object thereof, the defendant, Frank Menefee, afterwards and on, to-wit, the 5th day of June, 1912, did, at Portland, Oregon, execute and cause to be transmitted, sent and telegraphed over and by means of the wires of the Western Union Telegraph Company, a certain telegram to Mr. Edward E. Amsden, at Bender Hotel, Houston, Texas, of which the following is a full, true and correct copy, to-wit:

“DAY LETTER

THE WESTERN UNION TELEGRAPH
COMPANY.

Portland, Ore., June 5, 1912.

Edward E. Amsden,

Bender Hotel,

Houston, Texas.

Patents and applications filed fully protect Cashier Adding machine computing machine little change maker and currency paying machine. After extensive search our attorneys assure us amply protected in monopoly of devices. No suits whatever pending against Company. Assets Bills and accounts receivable and cash on hand for stock sold two hundred ninety five thousand. Real estate including factory site and building one hundred twenty seven thousand. Machinery tools equipment and development commercial machines one hundred twenty thousand. Paid for patents stock and cash approximately four hundred thousand. Liabilities unpaid on patent contracts not yet due twenty five thou-

sand. Bills payable and endorsement on paper sold seventeen thousand. Total assets Nine hundred forty two thousand. Total liabilities forty-two thousand.

Frank Menefee."

Charge

U.S.C.Co.

FM:HG

with the intent then and there in the said defendant, Frank Menefee, that the said telegram should be sent, transmitted and delivered to the said Edward E. Amsden, by the said The Western Union Telegraph Company; said telegram was then and there of and concerning the aforesaid scheme and artifice to defraud, which said scheme and artifice to defraud, the defendants, Frank Menefee, F. M. LeMonn, Thomas Bilyeu, E. O. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine, and Oscar A. Campbell, had theretofore as hereinabove alleged, conspired, combined, confederated and agreed to devise and to execute;

Contrary to the statute in such cases made and provided, and against the peace and dignity of the United States of America.

Dated at Portland, Oregon, this 27th day of February, 1915.

A TRUE BILL

JOHN DRISCOLL,

Foreman of the United States Grand Jury.

CLARENCE L. REAMES,

United States Attorney.

The following witnesses were examined under oath before the Grand Jury:

W. S. Overlin, F. A. Bullington, Fred V. Conley, Nelson White, J. F. Ploffer, N. C. Oviatt, C. J. W. Hayes, Murtle Meadows, George W. Moyer, Harry Wainwright, John Marshall, C. F. L. Smith, A. A. Milliken, J. W. Zufall, Harry Caruthers, R. O. Holmes, John Straub, T. W. Harris, L. H. Robinson, C. K. Clarke, E. W. Draper, Jonas Hansen, W. B. Morse, E. D. Paine, R. L. Anderson, E. A. Mulkey, C. A. McMahon, R. L. Robinson, E. O. Tobey, S. M. Sim, J. W. Brett, J. S. Swenson, H. S. House, W. R. Litzenberg;

The following named witnesses appeared at their own request and testified under oath before said Grand Jury:

S. M. Mears, F. H. Gloyd, J. F. Robb, Frank Menefee (one of the defendants herein) and Thomas Bilyeu (one of the defendants herein).

Endorsed: A True Bill, John Driscoll, Foreman Grand Jury.

Filed February 27, 1915. G. H. Marsh, Clerk.

And afterwards, to wit, on Saturday, the 27th day of February, 1915, the same being the 102d judicial day of regular November, 1914, term of said Court; present: the Honorable Robert S. Bean, United

States District Judge presiding, the following proceedings were had in said cause, to-wit:

ORDER TO FILE INDICTMENT.

Now on this day come into court the Grand Jury and through its foreman presents to the court an indictment, charging the above named defendants and each of them with the violation of Section 37 of the Federal Penal Code, endorsed "A True Bill," which indictment is received by the court and ordered to be filed and placed upon the general files of this court. Whereupon, it is ordered that separate bench warrants issue for the arrest of each of the defendants above named, and that the bail of each of said defendants be and the same is hereby fixed at \$2500.

And afterwards, to wit, on Wednesday, the 10th day of March, 1915, the same being the 9th judicial day of the regular March, 1915, term of said Court; present: the Honorable Robert S. Bean, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

RECORD OF ARRAIGNMENT AND PLEA OF B. F. BONNEWELL, H. M. TODD, JOSEPH HUNTER, AND P. E. MURAINÉ.

Now at this day come the plaintiff by Mr. Clarence L. Reames, United States Attorney, and the defendants B. F. Bonnewell, H. M. Todd, Joseph Hunter, and P. E. Muraine, each in his own proper person and

by Mr. Martin L. Pipes of counsel, and being duly arraigned upon the indictment herein, each of said defendants for himself, for plea to said indictment, says he is not guilty.

And afterwards, to wit, on Wednesday, the 5th day of May, 1915, the same being the 58th judicial day of the regular March, 1915, term of said court; present: the Honorable Robert S. Bean, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

RECORD OF ARRAIGNMENT AND PLEA OF
FRANK MENEFEE, THOMAS BILYEU
AND OSCAR A. CAMPBELL.

Now at this day comes the plaintiff by Mr. Clarence L. Reames, United States Attorney, and the defendants Frank Menefee, Thomas Bilyeu, and Oscar A. Campbell, each in his own proper person and by Mr. Martin L. Pipes and Mr. W. M. Cake, of counsel, whereupon, said defendants being duly arraigned upon the indictment herein for plea thereto, each for himself, says he is not guilty.

And afterwards, to wit, on Tuesday, the 6th day of July, 1915, the same being the 2nd judicial day of the regular July, 1915, term of said Court; present: the Honorable Robert S. Bean, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

RECORD OF EMPANELLING JURY AND
TRIAL.

Now at this day come the plaintiff by Mr. Clarence L. Reames, United States Attorney, and Mr. John J. Beckman, Assistant United States Attorney, and the defendants Frank Menefee and Thomas Bilyeu, each in his own proper person and by Mr. Martin L. Pipes and Mr. William M. Cake, of counsel; and the defendant Frank LeMonn in his own proper person and by Mr. A. P. Dobson, of counsel; and the defendant O. E. Gernert in his own proper person and by Mr. Dan J. Malarkey, of counsel; and the defendants B. F. Bonnewell and H. M. Todd, each in his own proper person and by Mr. J. J. Fitzgerald, of counsel; and the defendant Oscar A. Campbell in his own proper person and by Mr. Larkin Bilyeu, of counsel. Whereupon, said defendant O. E. Gernert objects to the order heretofore made severing the defendant P. E. Muraine in this cause, and the defendants O. E. Gernert, B. F. Bonnewell, H. M. Todd, and F. M. LeMonn, severally move the court for a separate trial, and the court having heard the arguments of counsel, it is ordered that each of said motions be and the same are hereby denied, and thereupon this being the time set for the trial of this cause, the court proceeds to the selecting of a jury to try the issues joined, and the hour of adjournment having arrived, the further trial of this cause is continued until tomorrow, Wednesday, July 7, 1915, at 10 o'clock A. M.

And afterwards, to wit, on Wednesday, the 7th day of July, 1915, the same being the 3rd judicial day of

the regular July, 1915, term of said Court; present: the Honorable Robert S. Bean, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

RECORD OF EMPANELLING JURY AND TRIAL.

Now, at this day, comes the plaintiff by Mr. Clarence L. Reames, United States Attorney, and Mr. John J. Beckman, Assistant United States Attorney, and the defendants, Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, and Oscar A. Campbell, appearing each in his own person and by his counsel as of yesterday, and the trial of this cause is resumed, and thereupon come the following jurors to try the issues joined, viz., Geo. T. Prather, David N. Lash, Frank Dayton, Hugh Carroll, H. C. Bressler, W. D. Allard, J. V. Zan, Wm. Fleming, G. L. Kelty, Harry M. Francis, J. D. Kelly and George McGraw, twelve good and lawful men of the district who being accepted by both parties are duly empaneled and sworn. And the hour of adjournment having arrived, the further trial of this cause is continued until tomorrow, Thursday, July 8, 1915, at 10 o'clock A. M.

And afterwards, to wit, on Wednesday, the 28th day of July, 1915, the same being the 21st judicial day of the regular July, 1915, term of said Court; present: the Honorable Robert S. Bean, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

RECORD OF TRIAL AND ENTRY OF AP-
PEARANCE OF J. L. ATKINS AS ATTOR-
NEY FOR THOMAS BILYEU.

Now, at this day, comes the plaintiff by Mr. Clarence L. Reames, United States Attorney, and Mr. John J. Beckman, Assistant United States Attorney, and the defendants Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, and Oscar A. Campbell, appearing each in his own proper person and by his counsel as of yesterday, and the jury empaneled herein being present and answering to their names, the trial of this cause is resumed; whereupon on motion of Mr. Martin L. Pipes, of counsel for the defendant, Thomas Bilyeu, it is ordered that the appearance of Mr. J. L. Atkins be and the same is hereby entered as of counsel for the said defendant Thomas Bilyeu, and the jury having heard the evidence adduced and the hour of adjournment having arrived, the further trial of this cause is continued until tomorrow, Thursday, June 29, 1915.

And afterwards, to wit, on Friday, the 13th day of August, 1915, the same being the 37th judicial day of the regular July, 1915, term of said Court; present: the Honorable Robert S. Bean, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

RECORD OF TRIAL AND HEARING ON MOTIONS FOR DIRECTED VERDICTS.

Now at this day comes the plaintiff by Mr. Clarence L. Reames, United States Attorney, and the defendants Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, and Oscar A. Campbell, appearing each in his own proper person and by his counsel as of yesterday, and the jury empaneled herein being present and answering to their names, the trial of this cause is resumed; whereupon both of the parties having rested, said defendants Frank Menefee, Thomas Bilyeu, F. M. LeMonn, and O. A. Campbell orally move the court to direct the jury to return a verdict of not guilty as to them, and the defendants, B. F. Bonnewell, H. M. Todd, and O. E. Gernert having heretofore severally filed motions for the court to direct the jury to return a verdict of not guilty as to them, the said motions of said defendants B. F. Bonnewell, H. M. Todd, O. E. Gernert, and Thomas Bilyeu come on to be heard by the court; whereupon it is ordered that the jury empaneled herein be excused from attendance upon this court during the said argument and until Monday, August 16, 1915, at two o'clock P. M., and the court having heard the arguments of counsel for respective parties and the hour for adjournment having arrived, the further trial of this cause is continued until tomorrow, Saturday, August 14, 1915, at 10 o'clock A. M.

And afterwards, to wit, on Monday, the 16th day of August, 1915, the same being the 37th judicial day of the regular July, 1915, term of said Court; pres-

ent: the Honorable Robert S. Bean, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

RECORD OF TRIAL AND ORDER ON MOTIONS FOR DIRECTED VERDICTS.

Now at this day come the plaintiff by Mr. Clarence L. Reames, United States Attorney, and Mr. John J. Beckman, Assistant United States Attorney, and the defendants Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, and Oscar A. Campbell, appearing each in his own proper counsel and by his counsel as of Saturday, and the jury empaneled herein being present answer to their names. This cause having been submitted to the court upon the several motions of the defendants B. F. Bonnewell, H. M. Todd, O. E. Gernert, and Thomas Bilyeu for a directed verdict of not guilty in favor of said defendants, and the court having duly considered said motions, it is ordered that said motions be and the same are hereby denied as to the said defendants B. F. Bonnewell, H. M. Todd, O. E. Gernert, and that said motion be allowed as to the said defendant Thomas Bilyeu; whereupon said jury having heard the arguments of counsel and the hour of adjournment having arrived, the further trial of this cause is continued until Tuesday, August 17, 1915, at 10 o'clock A. M.

And afterwards, to wit on Friday, the 20th day of August, 1915, the same being the 41st judicial day of the regular July, 1915, term of said Court; pres-

ent: the Honorable Robert S. Bean, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

RECORD OF TRIAL AND SUBMISSION OF CAUSE TO JURY.

Now at this day comes the plaintiff by Mr. Clarence L. Reames, United States Attorney, and Mr. John J. Beckman, Assistant United States Attorney, and the defendants Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, and Oscar A. Campbell, appearing each in his own proper person and by his counsel as of yesterday, and the jury empaneled herein being present and answering to their names the trial of this cause is resumed; and the said jury having heard the evidence adduced and the arguments of counsel and the charge of the court retire in charge of proper sworn officers to consider of their verdict.

And afterwards, to wit, on Saturday, the 21st day of August, 1915, the same being the 42d judicial day of the regular July, 1915, term of said Court; present: the Honorable Robert S. Bean, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

RECORD OF TRIAL AND RECORD OF VERDICT.

Now, at this day, come the plaintiff by Mr. Clarence L. Reames, United States Attorney, and Mr. John J.

Beckman, Assistant United States Attorney, and the defendants Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, and Oscar A. Campbell appearing each in his own proper person and by his counsel as of yesterday; whereupon the jury empaneled herein come into court and return to the court their verdict in words and figures as follows, to-wit, "We, the jury in the above entitled action, find the defendants Frank Menefee, F. M. LeMonn, O. E. Gernert, B. F. Bonnewell, H. M. Todd, and Oscar A. Campbell guilty as charged in the indictment, and the defendant Thomas Bilyeu not guilty. We, the jury, also recommend the defendant, Oscar A. Campbell, to the mercy of the court. Wm. Fleming. Foreman." which verdict is received by the court and ordered to be filed; whereupon on motion of said plaintiff it is ordered that each of said defendants except the defendant F. M. LeMonn be allowed to go upon the bail heretofore given by them respectively, but that the bail of the defendant F. M. LeMonn be and the same is hereby increased to the sum of \$5000.00 and that in default of said bail he stand committed to the county jail of Multnomah county, Oregon, and on motion of said defendants, it is ordered that they be and each of them is hereby allowed ten days from this date within which to file a motion for new trial herein.

And afterwards, to wit, on the 21st day of August, 1915, there was duly filed in said Court a Verdict, in words and figures as follows, to wit:

VERDICT.

*In the District Court of the United States for the
District of Oregon.*

United States of America

vs.

Frank Menefee, F. M. LeMonn, Thomas Bilyeu,
O. E. Gernert, B. F. Bonnewell, H. M.
Todd, Joseph Hunter, O. L. Hopson, P. E.
Murane, and Oscar A. Campbell.

Defendants.

We, the jury in the above entitled action, find the defendants Frank Menefee, F. M. LeMonn, O. E. Gernert, B. F. Bonnewell, H. M. Todd, and Oscar A. Campbell guilty as charged in the indictment, and the defendant Thomas Bilyeu not guilty.

We, the jury, also recommend the defendant, Oscar A. Campbell, to the mercy of the Court.

Wm. Fleming, Foreman.

Filed, August 21, 1915,

G. H. Marsh, Clerk.

And afterwards, to wit, on Monday, the 25th day of October, 1915, the same being the 97th judicial day of the regular July, 1915, term of said Court; present: the Honorable Robert S. Bean, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

RECORD OF SENTENCE OF FRANK MENEFEE, F. M. LeMONN, O. E. GERNERT, B. F. BONNEWELL, H. M. TODD, AND OSCAR A. CAMPBELL. ORDER ADMITTING TO BAIL. AND ORDER ALLOWING TIME TO SUBMIT BILL OF EXCEPTIONS, AND STAYING EXECUTION.

Now at this day come the plaintiff by Mr. Clarence L. Reames, United States Attorney, and the defendants Frank Menefee, F. M. LeMonn, O. E. Gernert, B. F. Bonnewell, H. M. Todd, and O. A. Campbell, each appearing in his own proper person and by Mr. Martin L. Pipes, Mr. A. P. Dobson, Mr. John F. Logan, Mr. Robert F. Maguire, and Mr. Larkin Bilyeu, of counsel; whereupon said plaintiff moves the court for judgment upon the verdict of the jury heretofore filed herein; whereupon the court having heard the statements made on behalf of said defendants:

It is considered that said defendant Frank Menefee and the said defendant F. M. LeMonn each be imprisoned in the United States penitentiary at McNeils Island, Washington, for the term of one year and ten days, and that said defendants O. E. Gernert, B. F. Bonnewell, H. M. Todd, and Oscar A. Campbell each be imprisoned in the county jail of Multnomah County, Oregon, for the term of four months and that each of said defendants stand committed until this sentence be performed or until they be discharged according to law. Whereupon on motion of said defendants it is ORDERED that they be and they are hereby allowed until

December 1, 1915, within which to submit a bill of exceptions herein, and on motion of said plaintiff it is ORDERED that the bail of the said defendants Frank Menefee and F. M. LeMonn be and the same is hereby fixed at the sum of \$5000.00 and that the bail of the said defendants O. E. Gernert, B. F. Bonnewell, H. M. Todd, and Oscar A. Campbell be and the same is hereby fixed at the sum of \$2500.00; and it is further ORDERED that execution of the sentence be stayed as to said defendants upon the filing of bonds in the amounts herein fixed, until December 1, 1915.

And it appearing to the court that the said F. M. LeMonn does not desire to give further bail, it is ORDERED that commitment forthwith issue in accordance with the judgment of this court as to the said defendant.

And afterwards, to wit, on the 11th day of February, 1916, there was duly filed in said Court and cause, by Frank Menefee, B. F. Bonnewell, H. M. Todd and Oscar A. Campbell, a Bill of Exceptions, in words and figures as follows, to wit:

*In the District Court of the United States for the
District of Oregon.*

United States of America,

vs.

Frank Menefee, F. M. LeMonn, Thomas Bilyeu,
O. E. Genert, B. F. Bonnewell, H. M.
Todd, Joseph Hunter, O. L. Hopson, P. E.
Muraine, and Oscar A. Campbell,

Defendants.

BILL OF EXCEPTIONS.

BE IT REMEMBERED, that the above entitled cause came on for trial in the said The United States District Court for the District and State of Oregon, the plaintiff appearing by the United States District Attorney, Clarence L. Reames; the defendant Frank Menefee appearing by Martin L. Pipes and W. M. Cake; the defendant F. M. LeMonn appearing by A. P. Dobson; the defendant Thomas Bilyeu appearing by Martin L. Pipes and W. M. Cake; the defendant O. E. Gernert appearing first by Dan J. Malarkey, and subsequently, Mr. Malarkey having withdrawn from the case, by Robert F. Maguire; the defendants B. F. Bonnewell and H. M. Todd appearing by J. J. Fitzgerald, and the defendant Oscar A. Campbell appearing by Lark Bilyeu, the said defendants Joseph Hunter, O. L. Hopson and P. E. Muraine not being on trial, and the following proceedings were had:

The plaintiff, to sustain the issues on its part, offered evidence, which was received, tending to support the allegations of the indictment, and to prove that the United States Cashier Company, at all the times specified in the indictment, was a corporation organized and existing under and by virtue of the laws of the State of Oregon, with its principal office and place of business in the City of Portland, County of Multnomah, and within the State and District of Oregon; that at all the times between the 1st day of September, 1910, and the 31st day of January, 1914, the defendant Frank Menefee was the duly elected, qualified and acting director of said corporation, and that at and during all of the times be-

tween the 1st day of September, 1910, and the 31st day of January, 1914, the said Frank Menefee was the duly elected, qualified and acting president of said corporation, and that at and during all of the times between the 28th day of September, 1910, and the 31st day of January, 1914, the said Frank Menefee was the duly elected, qualified and acting General Manager of said corporation; that at all the times and dates between the 1st day of September, 1910, and the 1st day of November, 1912, the defendant F. M. LeMonn was the duly elected, qualified and acting Sales Manager of said corporation; that at and during all of the times and dates between the 1st day of January, 1911, and the 1st day of April, 1912, the defendant O. E. Gernert was an agent and salesman of said corporation, and the duly appointed, qualified and acting Assistant Sales Manager of said corporation; that at and during all of the times and dates between the 15th day of April, 1911, and the 31st day of January, 1914, the defendant B. F. Bonnewell was the duly elected, qualified and acting Fiscal Agent for the said corporation, and an agent and salesman for said corporation, engaged in selling the stock thereof; that at and during all of the times and dates between the 15th day of April, 1911, and the 1st day of September, 1913, the defendant H. M. Todd was a duly appointed, qualified and acting Sales Agent for said corporation, engaged in selling the stock of the said corporation; that at and during all the times and dates between the 26th day of May, 1911, and the 31st day of January, 1914, the defendant Joseph Hunter was the duly appointed, qualified and acting Sales Agent for said corporation,

engaged in selling the stock thereof; that at and during all the times and dates between the 23rd day of November, 1910, and the 1st day of July, 1913, the defendant O. L. Hopson was the duly appointed, qualified and acting Sales Agent of said corporation, engaged in selling the stock thereof; that at and during all the times and dates between the 6th day of March, 1911, and the 31st day of January, 1914, the defendant P. E. Muraine was the duly appointed, qualified and acting Sales Agent for said corporation; that at and during all of the times and dates between the 12th day of June, 1911, and the 31st day of January, 1914, the defendant Oscar A. Campbell was the duly elected, qualified and acting director of said corporation, and that at and during all of the times between the 30th day of January, 1912, and the 31st day of January, 1914, the defendant Oscar A. Campbell was the duly elected, qualified and acting Vice-President of said corporation; that at and during all of the times between the 1st day of January, 1911, and the 1st day of July, 1913, said defendant Campbell was a sales agent for said corporation, engaged in selling the stock thereof; that at and during all of the times and dates between the 9th day of June, 1913, and the 31st day of January, 1914, the defendant Thomas Bilyeu was the duly elected, qualified and acting Director of said corporation.

That at and during all of the times and dates between the 1st day of September, 1910, and the 31st day of January, 1914, the capital stock of the said corporation amounted to the sum of \$1,200,000.00, divided and segregated by the articles of incorporation of said corpora-

tion into 120,000 shares of the par value, as fixed and stated in said articles of incorporation, of \$10.00 for each and every of said shares.

That hereafter wherever the term "THE DEFENDANTS" is used in this statement of the evidence, it means, includes and embraces the defendants Frank Menefee, F. M. LeMonn, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine and Oscar A. Campbell.

And the plaintiff, to sustain the issues on its part, offered evidence which was received, which evidence tended to prove that at the city of Portland, within Multnomah County, Oregon, and on or about September 1, 1910, THE DEFENDANTS did then and there unlawfully, wilfully and feloniously conspire, confederate and agree together to commit the acts made offenses and crimes by the laws of the United States to prevent the use of the United States mails to promote fraud, to wit, section two hundred fifteen of the criminal code of the United States; that is to say, THE DEFENDANTS did then and there unlawfully, wilfully and feloniously conspire, combine, confederate and agree together, and with divers other persons, to devise and execute a scheme and artifice to defraud to be effected by means of the post office establishment of the United States, and to obtain money and property by means of false and fraudulent representations, pretenses and promises from the fifty-five persons named in the indictment, and therein termed as INVESTORS, and from

divers other persons, and the public generally, by inducing, inciting and procuring the said INVESTORS and divers and other persons and the public generally, to open communication with THE DEFENDANTS and with the said United States Cashier Company, a corporation, and by inducing, inciting and procuring the said INVESTORS and divers other persons, and the public generally, to purchased from THE DEFENDANTS and from said corporation, namely, United States Cashier Company, the shares of stock of said corporation and to pay over, deliver and to transfer to THE DEFENDANTS and to the said corporation, namely, United States Cashier Company, in exchange and payment for said shares of stock the money and property of the said INVESTORS and of divers other persons, the payment of said sums of money to THE DEFENDANTS and to the said corporation, namely, United States Cashier Company, and the transfer of said property to THE DEFENDANTS and to the said corporation to be induced, incited and procured by the false and fraudulent representations of THE DEFENDANTS to be made to the said INVESTORS and to divers other persons by THE DEFENDANTS.

That it was a part and portion of said unlawful, wilful and felonious conspiracy, so entered into by THE DEFENDANTS that said scheme and artifice to defraud the said INVESTORS and divers other persons, and the public generally, should be by THE DEFENDANTS carried out, carried on and effected by the further means, methods, manner and plans, that is to say, the DEFENDANTS would cause, induce, incite

and procure the said INVESTORS and many and divers other persons, and the public generally, to pay over and to deliver to and to transfer to THE DEFENDANTS, and to the said corporation in payment of and in exchange for the shares of stock of said corporation, United States Cashier Company, money and property of the value of more than the sum of one million dollars, which said payment of said money and which transfer of said property was to be by THE DEFENDANTS induced, incited, procured and obtained by the dishonest, fraudulent and false representations and promises hereinafter set forth, all to be made to the said INVESTORS by THE DEFENDANTS and to divers other persons and the public generally, and to swindle, cheat and defraud said INVESTORS and each, every and all thereof, and various and sundry other persons, and the public generally, out of all of the said sums of money and the said property that the said INVESTORS and various other persons, and the public generally, should pay over and deliver to THE DEFENDANTS or either thereof, or to the said corporation;

That for the purpose of inducing, inciting and procuring the said INVESTORS and various and divers other persons and the public generally, to purchase said shares of stock of said corporation and to pay over and to deliver to THE DEFENDANTS and to the said corporation, money and property in exchange and payment therefor, THE DEFENDANTS would falsely and fraudulently and by means of printed advertisements to be by THE DEFENDANTS inserted in

newspapers, in pamphlets, in catalogues, in circulars and in letters, and to be written in letters, which said newspapers, pamphlets, catalogues, circulars, and letters were to be by THE DEFENDANTS transmitted and caused to be transmitted and sent by and through, and by means of the postoffice establishment of the United States, to the said INVESTORS and to divers other persons, and by words to be orally spoken by THE DEFENDANTS represent, pretend and promise that the said corporation, owned the patents to a certain "CHANGE COMPUTING MACHINE," a certain "BANK CASHIER MACHINE," a certain "LIGHTNING CHANGE MAKER," a certain "CURRENCY PAYING MACHINE," and a certain "NEW STYLE ADDING MACHINE," and that the said corporation was engaged in the business of manufacturing and selling said machines, and each, every and all thereof; that on account of the said alleged ownership of said patents and the said alleged manufacturing of said machines by said corporation, the said shares of stock of said corporation, were of great commercial value and that large dividends would be by said corporation declared and paid thereon to the said INVESTORS and to all other persons who should purchase the same from THE DEFENDANTS or from the said corporation; that said corporation would declare and pay to all of said INVESTORS, and to divers other persons, and to all persons who should purchase the shares of stock from said corporation large and certain dividends upon said stock within six months from the date that any of said persons should purchase any

of said shares of stock from THE DEFENDANTS, or either thereof, or from said corporation; that the said corporation was the owner and in the possession of large bona fide orders for the purchase of said machines and that on account of said orders for the said machines the said corporation would make a large and certain profit; that the financial condition of the said corporation was excellent, and that the assets of said corporation far exceeded in value the total amount of the liabilities against and owed by said corporation; that a certain large amount of the capital stock of said corporation, which said stock would be offered for sale to the said INVESTORS and to divers other persons and the public generally, belonged to and was the property of the said corporation, and that the money derived from the sale thereof would be by said corporation invested and used in such a manner as to increase the assets of said corporation, and to make its shares of stock more valuable, and particularly for the purpose of purchasing and building factories in which to increase the manufacture of said machines; that inasmuch as the assets of said corporation exceeded and was greater than the liabilities of said corporation, THE DEFENDANTS were justified in raising and increasing the selling price of said shares of stock from the said par value of ten dollars each to a selling price of eleven dollars each; from a selling price of eleven dollars each to a selling price of twelve dollars and fifty cents each; from a selling price of twelve dollars and fifty cents each to a selling price of fifteen dollars each; from a selling price of fifteen dollars each to a selling price of twenty dollars each;

from a selling price of twenty dollars each to a selling price of thirty dollars each; and from a selling price of thirty dollars each to a selling price of fifty dollars each.

That in truth and in fact and as THE DEFENDANTS and each, every and all thereof at and during and between all the times and dates mentioned, specified and stated in the indictment then and there well knew, neither the said corporation, nor any of THE DEFENDANTS owned the patents to said certain "CHANGE COMPUTING MACHINE," or said certain "LIGHTNING CHANGE MAKER," or said certain "CURRENCY PAYING MACHINE," or said certain "NEW STYLE ADDING MACHINE," or either thereof; and

That in truth and in fact and as THE DEFENDANTS and each, every and all thereof, at and during and between all the times and dates mentioned, specified and stated in the indictment, then and there well knew, the said corporation was not engaged in either the business of manufacturing or selling said machines, or any thereof, but on the contrary its business was to sell and dispose of the said shares of stock; and

That, in truth and in fact and as THE DEFENDANTS and each, every and all thereof at and during and between all the times and dates mentioned, specified and stated in the indictment then and there well knew, the said shares of stock and each, every and all thereof, were of very little value and of practically no value whatsoever, and said shares of stock and each, every and all thereof were practically worthless; and

That, in truth and in fact and as THE DEFENDANTS and each, every and all thereof at and during and between all the times and dates mentioned, specified and stated in the indictment then and there well knew, no dividends whatsoever would ever be by said corporation, either declared or paid to the said INVESTORS, or to any other person who should purchase the said shares of stock by either the said corporation, or by any of THE DEFENDANTS; and

That in truth and in fact and as THE DEFENDANTS, and each, every and all thereof at and during and between all the times and dates mentioned, specified and stated in the indictment then and there well knew, none of the said INVESTORS, or any other person who should purchase said shares of stock, would ever receive, either from said corporation or from THE DEFENDANTS any dividend whatsoever; and

That in truth and in fact and as THE DEFENDANTS and each, every and all thereof at and during and between all the times and dates mentioned, specified and stated in the indictment, then and there well knew, the said corporation was neither the owner nor in the possession of the said alleged bona fide orders for the purchase of said machines; and

That in truth and in fact and as THE DEFENDANTS and each, every and all thereof at and during and between all the times and dates mentioned, specified and stated in the indictment, then and there well knew, the financial condition of said corporation was not excellent, but on the contrary at and during all of the times and

dates mentioned, specified and stated in the indictment, and as **THE DEFENDANTS** then and there well knew, the said corporation was absolutely insolvent; and

That in truth and in fact and as **THE DEFENDANTS** and each, every and all thereof at and during and between all the times and dates mentioned, specified and stated in the indictment, then and there well knew, the value of the assets of said corporation amounted to a sum much less than the total amount of the liabilities against and owed by said corporation; and

That in truth and in fact and as **THE DEFENDANTS** and each, every and all thereof at and during and between all the times and dates mentioned, specified and stated in the indictment, then and there well knew, a very large amount of the shares of stock of said corporation, which **THE DEFENDANTS** were to represent as being the property of the said corporation, consisted of shares of stock owned by **THE DEFENDANTS** and all of the sums of money and all of the property received on account of the sale thereof would be appropriated by **THE DEFENDANTS** and none of the same or any part thereof would be paid into the treasury of the said corporation, to be used by it, either for increasing the assets of said corporation, or otherwise; and

That in truth and in fact, and as **THE DEFENDANTS** and each, every and all thereof at and during and between all the times and dates mentioned, specified and stated in the indictment, then and there well knew, none of **THE DEFENDANTS** or any thereof, were at any time on account of the financial condition of said corpor-

ation justified in either raising or increasing the selling price of said shares of stock or any thereof; and

That in truth and in fact and as **THE DEFENDANTS** and each, every and all thereof at and during and between all the times and dates mentioned, specified and stated in the indictment, then and there well knew, each and every person who should purchase any of said shares of stock from **THE DEFENDANTS** or from said corporation, would suffer and sustain a loss on account of said transaction of all sums of money which any of said persons should pay over or deliver to **THE DEFENDANTS** or to said corporation, in exchange or payment for said shares of stock.

That it was a further part and portion of said unlawful, wilful and felonious conspiracy so entered into by **THE DEFENDANTS** that said scheme and artifice to defraud the said **INVESTORS** and divers other persons, and the public generally, should be by **THE DEFENDANTS** carried out, carried on and effected by the further means, methods, manner and plan, that is to say, that for the purpose of inducing, inciting and procuring the said **INVESTORS** and divers other persons, and the public generally, to purchase said shares of stock from said corporation and from **THE DEFENDANTS** and to pay over and deliver to **THE DEFENDANTS**, and to the said corporation, money and property in exchange and in payment therefor, **THE DEFENDANTS** would from time to time during the existence of said conspiracy, fraudulently and dishonestly publish

and cause to be published, false and untrue written and printed statements of the assets of said corporation, and false and untrue written and printed statements of the liabilities owed by said corporation, and false and untrue written and printed statements of the financial condition of said corporation. That in said false and untrue statements of the assets of said corporation, and in each, every and all thereof, the assets of said corporation would be by **THE DEFENDANTS** stated to be sums greatly in excess of the true value of all of the assets of said corporation; that in said false and untrue statements of the liabilities owed by said corporation, and in said false and untrue statements of the financial condition of said corporation and in each, every and all thereof, there would be by **THE DEFENDANTS** omitted therefrom liabilities owed by said corporation amounting to more than the sum of one half million dollars;

That it was a further part and portion of said wilful, unlawful and felonious conspiracy so entered into by **THE DEFENDANTS** that said scheme and artifice to defraud the said **INVESTORS** and divers other persons, and the public generally, should be carried out, carried on and effected by **THE DEFENDANTS** selling said shares of stock to the said **INVESTORS** and to divers other persons in the following states, namely, Oregon, Washington, California, Idaho, Montana, Wyoming, Utah, Texas, Iowa, North Dakota, Michigan, Illinois, Colorado, New York, and many and divers other states; that **THE DEFENDANTS** would so manage and control the business affairs of said corporation, to the end that more than twenty-five per cent of all

of the sums of money which should be by the said INVESTORS and by divers other persons and by the public generally, paid over, delivered and transferred to said corporation, and to THE DEFENDANTS in exchange and payment for said shares of stock, would be appropriated by THE DEFENDANTS to their own use and gain; that for the purpose of inducing, inciting and procuring the said INVESTORS and various and divers other persons and the public generally, to purchase said shares of stock of said corporation and to pay over and to deliver to THE DEFENDANTS and to the said corporation, money and property in exchange and payment therefor, THE DEFENDANTS would increase the selling price of said shares of stock from the said par value of ten dollars each to a selling price of eleven dollars each; from a selling price of eleven dollars each to a selling price of twelve dollars and fifty cents each; from a selling price of twelve dollars and fifty cents each to a selling price of fifteen dollars each; from a selling price of fifteen dollars each to a selling price of twenty dollars each; from a selling price of twenty dollars each to a selling price of thirty dollars each; and from a selling price of thirty dollars each to a selling price of fifty dollars each; by placing and causing to be placed in the post office of the United States, at Portland, in Multnomah County, Oregon, and causing to be delivered by the post office establishment of the United States, the said newspapers, pamphlets, catalogues, circulars and letters, and other letters to be written by THE DEFENDANTS which said letters would request the said INVESTORS and divers other

persons to remit and to pay to **THE DEFENDANTS** and to said corporation money in payment and exchange for said shares of stock, all of said newspapers, pamphlets, catalogues, circulars, and letters, to be sent and delivered by the postoffice establishment of the United States to the persons to whom addressed in pursuance of said conspiracy;

That the said conspiracy, combination and agreement aforesaid should and would continue from the said 1st day of September, 1910, until and including the 1st day of January, 1915; that said conspiracy was to be a continuing conspiracy, and that it was to continue at all times between the 1st day of September, 1910, until and including the 1st day of January, 1915, and that at and during all of the times and dates **THE DEFENDANTS** would continue to be parties to said conspiracy and would continue to commit the said acts, and crimes hereinbefore set forth in detail.

That the said wilful, unlawful and felonious conspiracy, combination and agreement, aforesaid, so entered into by **THE DEFENDANTS** on or about the 1st day of September, 1910, continued from the date of said conspiracy until and including the 1st day of January, 1915; that at and during all of the times and dates between the said 1st day of September, 1910, and the 1st day of January, 1915, said wilful, unlawful and felonious conspiracy, combination and agreement was continually in existence and in operation, and at and during all of said times **THE DEFENDANTS** continued to wilfully, unlawfully and feloniously conspire, combine, con-

federate and agree together to commit the said crime hereinbefore set forth in detail.

And the plaintiff offered evidence tending to prove that in pursuance of the said conspiracy and to effect the object thereof, the defendants B. F. Bonnewell, Frank Menefee and F. M. LeMonn committed each, every and all of the overt acts that are mentioned, specified and stated in the indictment in the manner and at the several times and places respectively alleged and stated in said indictment.

The plaintiff offered evidence which was received and which tended to prove that during all of the times stated in the indictment the Portland Oregonian, The Oregon Daily Journal, and The Evening Telegram were newspapers published and issued daily and regularly at Portland, in Multnomah County, Oregon; that during said times said newspapers and each thereof had a circulation of more than 25,000 and that more than 25,000 copies of said papers and each thereof were, during all of the times stated in the indictment, daily and regularly transmitted through the agency of the post-office department at Portland, Oregon, to more than 25,000 subscribers located in all parts of the United States; that the defendant Frank Menefee, and the defendant F. M. LeMonn, inserted in said newspapers, and each, every and all thereof, the following hereinafter described advertisements of the United States Cashier Company, and copies of said papers from the files of said newspaper offices were introduced in evidence by the plaintiff. Each of said newspapers containing said advertisements displayed the names of all of the de-

fendants and the defendant Thomas Bilyeu, as officers of said corporation, namely, the United States Cashier Company. The advertisements referred to are as follows:

Government's exhibit No. 17 was page 9 of the issue of the Oregon Daily Journal of date October 30, 1910. This was a display advertisement containing two cuts of machines, model No. 1 being the Bilyeu cashier, and model No. 2 being the Potter cashier. The advertisement contained the statement that the "value of the patent rights for the Bilyeu Automatic cashier for the United States alone is almost priceless," and an invitation was offered the public to purchase the stock.

Government's exhibit No. 18 is page 7 of the Oregon Daily Journal of date November 20, 1910, displaying a similar advertisement as shown in Government's exhibit No. 17.

Government's exhibit No. 19 is page 3 of the issue of the Oregon Daily Journal of date November 27, 1910, containing substantially the same advertisement as Government's exhibit No. 17, with the exception that the announcement is made that the stock "will positively advance ten per cent on the 6th day of December, 1910."

Government's exhibit No. 20 is page 18 of the issue of the Oregon Daily Journal of date December 1, 1910, containing an advertisement substantially the same as the advertisement shown in Government's exhibit No. 19.

Government's exhibit No. 21 is page 10 of the issue of the Oregon Daily Journal of date December 5, 1910,

which is substantially the same advertisement as Government's exhibit No. 17, with the exception that the statement is made therein that the company will pay one hundred per cent.

Government's exhibit No. 23 is page 13 of the issue of the Oregon Daily Journal of date June 23, 1911, showing an advertisement substantially the same as Government's exhibit No. 17, with the exception that the statement is made that the company will pay one hundred per cent annually.

Government's exhibit No. 24 is page 12 of the issue of the Oregon Daily Journal of date June 27, 1911, showing an advertisement substantially the same as Government's exhibit No. 17.

Government's exhibit No. 25 is page 15 of the issue of the Oregon Daily Journal of date June 29, 1911, showing an advertisement substantially the same as Government's exhibit No. 17.

Government's exhibit No. 26 is page 12 of the issue of the Oregon Daily Journal of date June 30, 1911, containing an advertisement substantially the same as shown in Government's exhibit No. 17.

Government's exhibit No. 27 is page 12 of the issue of the Oregon Daily Journal of date October 17, 1911, which advertisement is substantially the same as Government's exhibit No. 17, and in addition thereto the following statements are contained therein:

“AT LAST”**“A CASH REGISTER, ADDING MACHINE, and CHANGE COMPUTER
ALL IN ONE.”**

“Don’t fail to see it in actual operation.

“Demonstrations at 266 Stark Street—Open evenings.

Followed by general description of computing machine and its functions.

References to millions made by Cash Register and millions made by Adding Machine people.

Yet Change Computing Machine of United States Cashier Company greater than either of these.

Giving figures of estimated profits.

Giving partial list of officers, advisory board, and directors.

Urging immediate investment because stock positively advanced to \$20 in a few days, and this is the last opportunity to buy at \$15 per share.

“The change-computing machine alone is sufficient to return the original investors tremendous profits.

“In addition to change-computing machine, the United States Cashier Company owns and controls four other equally wonderful and equally essential machines, viz,—the Bank Cashier, also a lightning change-maker; a currency-paying machine, also a new style adding machine. Any one of the above machines insures big returns, and future profit of the United States Cashier

Company, owning and controlling as it does patents of five such marvelous machines, is impossible of calculation."

Government's exhibit No. 31 is page 15 of the issue of the Evening Telegram of date November 17, 1910.

Government's exhibit No. 32 is page 10 of the issue of the Evening Telegram of date November 19, 1910.

Government's exhibit No. 33 is page 5 of the issue of the Evening Telegram of date November 23, 1910.

Government's exhibit No. 36 is page 5 of the issue of the Evening Telegram of date December 5, 1910.

Government's exhibit No. 37 is page 5 of the issue of the Evening Telegram of date March 11, 1911.

Government's exhibit No. 38 is page 13 of the issue of the Evening Telegram of date June 21, 1911.

Government's exhibit No. 39 is page 9 of the issue of the Evening Telegram of date June 26, 1911.

Government's exhibit No. 40 is page 11 of the issue of the Evening Telegram of date June 28, 1911.

Government's exhibit No. 41 is page 11 of the issue of the Evening Telegram of date June 30, 1911.

Each, every and all of the advertisements in the Telegram were substantially the same as those in the Oregon Daily Journal.

Government's exhibit No. 42 is page 11 of the issue of the Evening Telegram of date October 11, 1911. This advertisement is substantially the same as Government's exhibit No. 17, and in addition thereto there appears therein the following statement:

**"METHODS OF HANDLING MONEY
WILL BE REVOLUTIONIZED!"**

**"EXTENSIVE PRODUCTION OF MAR-
VELOUS MECHANICAL BRAIN"**

**"PRODUCT OF UNITED STATES CASH-
IER COMPANY TO BEGIN IMME-
DIATELY."**

Two cuts of machines and automatic bank cash-
ier. Between the cuts, the following quotation:

"Much has been said and written of the wonderful machines which have been in process of perfection by the United States Cashier Company for the past twelve months. Operations have now reached the stage where the extensive production of these wonderful machines commences immediately and deliveries will be made in about 90 days. They promise to outrival the cash register, adding machine, and typewriter in usefulness. In fact, will revolutionize the present systems of handling money. This is a broad statement, but one that is amply borne out by the machines themselves.

"For instance, the change-computing machine makes exchange mechanically, quickly and accurately. Suppose you purchase \$4.25 worth of merchandise and tender \$10 in payment. All that is necessary is to depress the keys representing the amount purchased and the amount tendered, pull the lever, and the machine pays \$5.75, the exact change. The operation is completed quicker than any human calculator can ever hope to do it, besides

being absolutely correct. In addition a visible permanent record is made of both transactions, besides totaling each sale as made.

“It is safe to state that there never was a machine placed on the market for which there is such a great actual need.

“The change-computing machine alone is sufficient to return the original investors tremendous profits.

“In addition to the change-computing machine, the United States Cashier Company owns and controls four other equally wonderful and equally essential machines, viz,—the Bank Cashier, also a lightning change-maker; a currency-paying machine, also a new style adding machine. Any one of the above machines ensures big returns, and the future profit of the United States Cashier Company, owning and controlling as it does patents of five such marvelous machines, is impossible of calculation.

“RECORD OF THE UNITED STATES CASHIER COMPANY UNPARALLELED.

In all respects the record of the United States Cashier Company stands unparalleled. The United States Cashier Company has been financed in less time than any other of the present day great successes. Since the company was first launched a little over a year ago, the leading bankers, business men, and capitalists of this city and the Pacific

Coast have subscribed for a sufficient amount of stock to assure its success. Today the assets of the United States Cashier Company (not including patents, which are conservatively valued at not less than \$500,000) are over \$400,000, including real estate, factory, equipment, machines, material, cash, and bills receivable.

“The only stock remaining unsold is 15,000 shares which are held in escrow by one of Portland’s leading banks for the payment of the original patent rights. The United States Cashier Company has the right to redeem this stock any time within twelve months.

“On or before November first, the United States Cashier Company stock will positively advance to \$20 per share. The last block of stock offered was eagerly purchased by keen business men at \$15 per share.

“Accordingly, instead of waiting to redeem this patent stock when it is due twelve months from now, the Board of Directors have decided to offer it now, while it lasts, subject to previous reservation, at \$15 per share. This will enable those who have recently made application for stock to be taken care of and will also afford a large manufacturing fund ample to meet any contingencies that might arise.”

Government’s exhibit No. 43 is page 13 of the issue of the Evening Telegram of date October 19, 1911, containing an advertisement substantially the same as shown

in Government's exhibit No. 17. In addition thereto the following statement is made:

"The change-computing machine alone is sufficient to return original investors tremendous profits.

"In addition to the change-computing machine, the United States Cashier Company owns and controls four other equally wonderful and equally essential machines, viz,—the bank cashier, also a lightning change-maker; a currency-paying machine, also a new style adding machine.

"Any one of the above machines insures big returns, and the future profit of the United States Cashier Company, owning and controlling as it does five such marvelous machines, is impossible of calculation.

"Stock positively advanced to \$20 in a few days.

"Last opportunity to buy at \$15 per share.

"Remember: Only a few shares remain.

"Time to act is now; the first thing tomorrow morning.

"Call, phone, write, or wire.

United States Cashier Company

"Manufacturers of automatic, computing, change-making recording, coin-paying machines, and adding machines."

Government's exhibit No. 44 is page 10 of the issue of the Evening Telegram of date October 30, 1911, which contains an advertisement substantially the same

as shown in Government's exhibit No. 17, with the following addition:

"ONLY ONE DAY MORE

**"LAST OPPORTUNITY TO BUY UNITED
STATES CASHIER COMPANY STOCK
AT \$15.00"**

**"POSITIVELY ADVANCES TO \$20 NO-
VEMBER 1."**

Containing a description of the computing machines, automatic bank cashier, change-computing, currency-paying, lightning change maker, and adding machine, and the statement regarding the breaking of all records by the United States Cashier Company in its financing, and containing following quotation: underscored:

"The United States Cashier Company not only controls one of the above machines,—any one of which would return big profits, but owns and controls patents and rights to all of them."

**"REMEMBER: Only one day more at \$15.
Stock positively advanced to \$20 November 1.**

"Call, write or wire."

Government's exhibit No. 47 is page 9 of the issue of the Morning Oregonian of date March 11, 1911.

Government's exhibit No. 48 is page 15 of the issue of the Morning Oregonian of date June 22, 1911.

Government's exhibit No. 49 is page 5 of the issue of the Morning Oregonian of date June 27, 1911.

Government's exhibit No. 50 is page 9 of the issue of the Morning Oregonian of date June 29, 1911; said four last mentioned exhibits and each thereof contained an advertisement of the United States Cashier Company substantially the same as shown in Government's exhibit No. 17.

Government's exhibit No. 51 is page 11 of the issue of the Morning Oregonian of date October 8, 1911, which shows an advertisement substantially the same as Government's exhibit No. 17, with the following addition:

**"METHODS OF HANDLING MONEY
WILL BE REVOLUTIONIZED."**

"EXTENSIVE production of marvelous mechanical brain—the product of the United States Cashier Company—to begin in about 90 days."

**"RECORD OF UNITED STATES CASH-
IER COMPANY UNPARALLELED."**

"In all respects the record of the United States Cashier Company stands unparalleled. The United States Cashier Company has been financed in less time than any other of the present day great successes. Since the company was first launched a little over a year ago, the leading banks, business men, and capitalists of this city and the Pacific Coast have subscribed for a sufficient amount of stock to assure its success. In fact, staid banks which never before endorsed anything of this nature, lent their enthusiastic support in most strongly

worded testimonials IN WRITING. Today the assets of the United States Cashier Company (not including patents) are over \$400,000, including real estate, factory equipment, machinery, machines, material, cash, and bills receivable."

"ONLY 15,000 SHARES REMAIN.

"The only stock remaining unsold is about 15,000 shares which are held in escrow by one of Portland's leading banks for payment of the original patent rights.

"The United States Cashier Company has the right to redeem this stock any time within twelve months."

"Much has been said and written of the wonderful machines which have been in process of perfection by the United States Cashier Company for the past twelve months. Operations have now reached the stage where from present indications extensive production of this wonderful machine will commence in about 90 days. They promise to outrival the cash register, adding machine, and typewriter in usefulness. In fact, will revolutionize the present system of handling money. This is a broad statement, but one that is amply borne out by the machines themselves.

"The computing machine alone is sufficient to return original investors of the United States Cashier Company tremendous profits. \$100 invested in National Cash Register stock returned \$42,780.

“In addition to the computing machine, the United States Cashier Company has perfected and patented four equally wonderful and equally essential machines, viz,—bank cashier, which permits paying checks rapidly by bank cashiers, as well as keeping a record of each transaction; a machine that banks have needed and wanted for years. Also a lightning change maker for pay-as-you-enter cars, theatres, etc., a currency paying and computing machine which pays paper money, gold and silver, with equal facility and correctness. Also a new style adding machine, which is more flexible than any now on the market and has less parts. Bank clerks cannot make mistakes. Paying tellers are saved hours of time each week. Department stores will quicken their service; merchants will be able to stop losses now impossible. In short, the whole system of handling money will be revolutionized.

“Any one of the above machines insures big returns, and the future profits of the United States Cashier Company, owning and controlling as it does five such marvelous machines, is impossible of calculation. The patent rights are virtually priceless and the demand for such money-saving, labor-saving devices is unlimited.”

Government's exhibit No. 52 is page 6 of the issue of the Oregonian of date October 15, 1911, containing an advertisement in which the following statement appears:

“The change computing machine alone is sufficient to return original investors tremendous profits.

“In addition to the change computing machine, the United States Cashier Company owns and controls four other equally wonderful and equally essential machines, viz,—the bank cashier, also a lightning change maker; a currency-paying machine, also a new style adding machine. Any one of the above machines insures big returns, and the future profit of the United States Cashier Company, owning and controlling as it does, five such marvelous machines, is impossible of calculation.”

Government’s exhibit No. 54 is page 12 of the issue of the Oregonian of date October 29, 1911, containing an advertisement substantially the same as Government’s exhibit No. 44, with the following addition:

“The United States Cashier Company not only controls one of the above machines,—any one of which would insure big profits, but owns and controls patents and rights to all of them.”

Each of the exhibits containing said advertisements showed full page display advertisements.

To sustain the issues on its part the Government offered in evidence exhibits 1 to 57 inclusive; exhibits 59 to 70 inclusive; exhibits 74 to 85 inclusive; exhibits 92 to 108 inclusive; exhibits 110 to 220, inclusive; exhibits 222 to 442 inclusive; these exhibits were as follows:

These exhibits and each, every and all thereof were received in evidence and read to the jury, the Govern-

ment having offered testimony which tended to prove the genuineness of each document and the authorship of each letter and telegram, together with proof that each of the letters was transmitted through the mails at the direction of the writer.

GOVERNMENT'S EXHIBITS.

No. 1, certified copy articles of incorporation United States Cashier Company.

No. 2, minute book No. 1, United States Cashier Company.

No. 3, minute book No. II, United States Cashier Company.

No. 4, pages 8 to 13, inclusive, minute book No. 1, United States Cashier Company.

No. 5, page 108, minute book No. 1, United States Cashier Company.

No. 6, pages 108, 111, 112 and 113, minute book No. 1, United States Cashier Company.

No. 7, pages 37, 38 and 39, minute book No. II, United States Cashier Company.

No. 8, page 48, minute book No. II, United States Cashier Company.

No. 9, certified copy articles of incorporation American Cash Record Company.

No. 10, page 108, minute book No. 1, United States Cashier Company.

No. 11, page 40, minute book No. II, United States Cashier Company.

No. 12, contract United States Cashier Company with Bonnewell and Todd, dated May 6, 1911.

No. 13, contract United States Cashier Company with Joseph Hunter, dated May 26, 1911.

No. 14, contract United States Cashier Company with Hopson and White, dated January 1, 1911.

No. 15, Oregon Journal advertising contract.

No. 16, Oregon Journal advertising contract.

No. 17, advertisement in Oregon Daily Journal.

No. 18, advertisement in Oregon Daily Journal.

No. 19, advertisement in Oregon Daily Journal.

No. 20, advertisement in Oregon Daily Journal.

No. 21, advertisement in Oregon Daily Journal.

No. 22, advertisement in Oregon Daily Journal.

No. 23, advertisement in Oregon Daily Journal.

No. 24, advertisement in Oregon Daily Journal.

No. 25, advertisement in Oregon Daily Journal.

No. 26, advertisement in Oregon Daily Journal.

No. 27, advertisement in Oregon Daily Journal.

No. 28, advertisement in Oregon Daily Journal.

No. 29, advertisement in Oregon Daily Journal.

No. 30, advertisement in Oregon Daily Journal.

No. 31, advertisement in Evening Telegram.

No. 32, advertisement in Evening Telegram.

No. 33, advertisement in Evening Telegram.

No. 34, advertisement in Evening Telegram.

No. 35, advertisement in Evening Telegram.

No. 36, advertisement in Evening Telegram.

No. 37, advertisement in Evening Telegram.

No. 38, advertisement in Evening Telegram.

No. 39, advertisement in Evening Telegram.

No. 40, advertisement in Evening Telegram.

No. 41, advertisement in Evening Telegram.

No. 42, advertisement in Evening Telegram.

No. 43, advertisement in Evening Telegram.

No. 44, advertisement in Evening Telegram.

No. 45, advertisement in Evening Telegram.

No. 46, Morning Oregonian advertising contract.

No. 47, advertisement in Morning Oregonian.

No. 48, advertisement in Morning Oregonian.

No. 49, advertisement in Morning Oregonian.

No. 50, advertisement in Morning Oregonian.

No. 51, advertisement in Morning Oregonian.

No. 52, advertisement in Morning Oregonian.

No. 53, advertisement in Morning Oregonian.

No. 54, advertisement in Morning Oregonian.

No. 55, advertisement in Morning Oregonian.

No. 56, copy letter LeMonn to Hunter and White and other salesmen, dated October 11, 1911.

No. 57, copy of letter LeMonn to Westerfield, October 11, 1911.

No. 59, copy letter LeMonn to Malthouse, February 9, 1912.

No. 60, copy letter LeMonn to Malthouse, February 21, 1912.

No. 61, copy letter LeMonn to White, October 3, 1911.

No. 62, copy letter LeMonn to Amsden Bros., August 14, 1911.

No. 63, copy letter LeMonn to Stevers, March 7, 1912.

No. 64, copy letter LeMonn to Salesmen, June 21, 1911.

No. 65, copy letter LeMonn to Griffiths, March 1, 1912.

No. 66, copy letter Menefee to Gernert, May 16, 1912.

No. 67, Sallaberry's first subscription blank.

No. 68, Sallaberry's check for \$3,000.

No. 69, Sallaberry's check for \$200.

No. 70, Sallaberry's subscription blank for 40 shares.

No. 74, Hansen receipt for \$4,500.

No. 75, letter Hansen to company, June 18, 1913.

No. 76, letter Gloyd to Hansen Bros., reply to exhibit 75.

No. 77, letter Bonnewell to Hansen Bros., July 17, 1913.

No. 78, Hansen receipt for \$1250, June 24, 1913.

No. 79, Owen receipt for \$450, May 24, 1912.

No. 80, Owen note for \$400, May 24, 1912.

No. 81, copy letter Owen to company, July 17, 1913.

No. 82, letter Gloyd to Owen, reply to exhibit 81.

No. 83, letter Gloyd to Owen, July 9, 1913.

No. 84, letter Gloyd to Owen, November 21, 1913.

No. 85, letter Gloyd to Owen, December 11, 1913.

No. 92, Mulkey subscription form, 50 shares, October 28, 1913.

No. 93, Mulkey subscription form, 40 shares, October 28, 1913.

No. 94, Robinson receipt for \$1300, March 14, 1912.

No. 95, John M. Johnson, subscription form for 50 shares, July 11, 1911.

No. 96, John M. Johnson subscription form, 50 shares, July 24, 1911.

No. 97, John M. Johnson subscription form, 100 shares, July 11, 1911.

No. 98, Moulton check for \$125, July 10, 1911.

No. 99, Moulton subscription form 10 shares, July 3, 1911.

No. 100, Winnett note for \$1400, September 23, 1911.

No. 101, letter Bonnewell to Lueddecke, May 8, 1913.

No. 102, letter Bonnewell to Lueddecke, January 14, 1913.

No. 103, letter Bonnewell to Lueddecke, February 16, 1913.

No. 104, Lueddecke receipt for \$3,000, December 9, 1912.

No. 105, Lueddecke subscription form 150 shares, Dec. 9, 1912.

No. 106, letter Bonnewell to Garl, October 30, 1911.

No. 107, letter LeMonn to Garl, October 20, 1911.

No. 108, letter LeMonn to Garl, November 17, 1911.

No. 110, copy of R. L. Anderson subscription form for 50 shares, October 29, 1913.

No. 111, original R. L. Anderson subscription form for 50 shares, October 29, 1913.

No. 112, Anderson note for \$1500, October 29, 1913.

No. 113, Anderson note for \$1500, October 29, 1913.

No. 114, letter Bonnewell and Todd to Company, July 20, 1911.

No. 115, Bonnewell to Sallaberry; indictment count No. 1.

No. 116-a and 116-b, LeMonn to L. E. Robinson; indictment count 12.

No. 117, LeMonn to L. H. Robinson; indictment count 5.

No. 118, copy letter sales manager to Westerfield, Oct. 25, 1911.

No. 119, copy letter Bonnewell to company, May 5, 1912.

No. 120, copy letter LeMonn to Bonnewell, May 11, 1912.

No. 121, carbon telegram LeMonn to Col. C. M. Jennings, May 11, 1912.

No. 122, carbon letter LeMonn to Amsden, January 12, 1911.

No. 123, carbon letter LeMonn to Amsden, January 12, 1911.

No. 124, carbon letter LeMonn to salesmen, March 6, 1911.

No. 125, carbon LeMonn circular, May 29, 1911.

No. 126, carbon letter LeMonn to Lanning, June 16, 1911.

No. 127, carbon "Confidential" LeMonn to salesmen, June 17, 1911.

No. 128, carbon letter LeMonn to Hopson, June 19, 1911.

No. 129, 129-a, 129-b and 129-c, carbon telegram to salesmen, July 3, 1911.

No. 130, 130-a, carbon telegram July 3, 1911, and letter to Western Union Telegraph Company request-

ing transmission same to Thomas Dowdell, and R. E. Porter.

No. 131, carbon letter LeMonn to salesmen, July 18, 1911.

No. 132, 132-a and 132-b, Sewall to company.

No. 133, carbon letter LeMonn to Roles and agents July 25, 1911.

No. 134, carbon letter LeMonn to Roles, August 10, 1911.

No. 135, carbon letter LeMonn to Amsden Bros., Sept. 8, 1911.

No. 136, Sewall to company, September 9, 1911, and company's reply, September 11, and carbon telegram same date.

No. 137, carbon letter LeMonn to Roles, October 27, 1911.

No. 138, carbon letter LeMonn to Roles, October 27, 1911.

No. 139, carbon telegram to salesmen, September 14, 1911.

No. 140, 140-a and 140-b, Westerfield to Menefee (no date), telegram to Westerfield, September 14, 1911; carbon letter Menefee to Westerfield, September 20, 1911.

No. 141, 141-a, 141-b and 141-c, carbon circular telegram, September 28, 1911.

No. 142, and 142-a, White to LeMonn, September 27, 1911.

No. 143 and 143-a, carbon circular telegram, October 4, 1911.

No. 144, carbon letter LeMonn to salesmen, October 5, 1911.

No. 145, carbon letter LeMonn to White and Hunter, October 9, 1911.

No. 146, 146a, 146b, 146c, 146d, 146e, carbon circular telegrams, October 19, 1911.

No. 147 and 147a, carbon circular telegram, October 26, 1911.

No. 148, carbon letter Menefee to Westerfield, October 26, 1911.

No. 149 and 149a, Westerfield to LeMonn, October 29, 1911; carbon letter of reply, November 4, 1911.

No. 150, carbon letter LeMonn to Sewall, October 30, 1911.

No. 151, carbon circular telegram, October 31, 1911.

No. 152, carbon letter LeMonn to Roles and others, Nov. 10, 1911.

No. 153, carbon letter LeMonn to Armstrong, Nov. 11, 1911.

No. 154, carbon letter LeMonn to Urquhart and others, December 2, 1911.

No. 155, carbon letter LeMonn to Armstrong, November 6, 1911.

No. 156, carbon letter LeMonn to Hopson, Hunter and others, December 9, 1911.

No. 157, carbon letter LeMonn to Westerfield, December 20, 1911.

No. 158, Westerfield to company, December 24, 1911; carbon telegram and letter of reply.

No. 159, Hopson to Menefee, December 28, 1911.

No. 159a, carbon letter Menefee to Lewis H. Lee, Jan. 2, 1912.

No. 160, letter Hunter and Hopson to LeMonn, Feb. 20, 1912.

No. 161, carbon letter Menefee to Hunter and Hopson, January 11, 1912.

No. 162, letter LeMonn, from Chicago, to Menefee, Jan. 7, 1912.

No. 163, telegram LeMonn from Detroit to Menefee, Jan. 10, 1912.

No. 164, page 34 of minute book No. II, United States Cashier Company.

No. 165, carbon telegram Menefee to LeMonn, Jan. 15, 1912.

No. 166, carbon circular telegram, January 16, 1912.

No. 167, carbon letter LeMonn to Jos. Hunter and others, January 27, 1912.

No. 168, carbon letter Menefee to O'Callaghan, Jan. 16, 1912.

No. 169, carbon circular telegram, January 24, 1914.

No. 170, carbon letter LeMonn to Amsden and others, Jan. 30, 1912.

No. 171, carbon letter LeMonn to Lanning and others, Jan. 30, 1912.

No. 172, carbon letter LeMonn to Muraine and other agents, together with circular telegram, February 19, 1912.

No. 173, carbon letter Menefee to Davidson, August 6, 1913.

No. 174, carbon circular telegram, February 28, 1912.

No. 175, carbon letter LeMonn to Amsden, March 1, 1912.

No. 176, carbon circular telegram, March 7, 1912.

No. 177, carbon letter LeMonn to F. E. Hall, March 19, 1912.

No. 178 and 178a, letter of M. Amsden, April 3, 1912.

No. 179, carbon LeMonn to Amsden, April 4, 1912.

No. 180, carbon letter LeMonn to Amsden, April 9, 1912.

No. 181, carbon letter LeMonn to Armstrong, March 29, 1912.

No. 182, carbon circular telegram, April 11, 1912.

No. 183a and 183b, telegram Hopson to LeMonn, April 13, 1912.

No. 184, carbon letter LeMonn to Hopson, April 22, 1912.

No. 185, carbon letter LeMonn to F. E. H., April 22, 1912.

No. 186, carbon telegram Menefee to Amsden, February 14, 1915.

No. 187, carbon circular telegram, April 24, 1912.

No. 188, 188a, 188b and 188c, Hopson to LeMonn, April 27, (1912?).

No. 189, carbon letter LeMonn to C. G. Hall, June 7, 1912.

No. 190, Hopson to Menefee, June 13, 1912.

No. 191 and 191a, carbon letter Menefee to Hunter and Hopson, June 22, 1912.

No. 192, carbon letter of president to Mr. Bell, Aug. 20, 1912.

No. 193 and 193a, telegram Hunter and Hopson to Menefee, June 7, 1912, and reply.

No. 194, telegram Hopson to Menefee, June 20, 1912.

No. 195, carbon telegram Menefee to Hunter and Hopson, July 8, 1912.

No. 196, letter LeMonn to Lydell Baker, April 3, 1912.

No. 197, printed article in the Pacific Banker of date April 6, 1912.

No. 198, bill of Pacific Banker.

No. 199, carbon letter LeMonn to Griffiths, April 8, 1912.

No. 200, circular LeMonn to stockholders, April 8, 1912.

No. 201, copy National Cash Register Company letter to LeMonn, January 8, 1912.

No. 202, copy letter Menefee to Wolcott, August 5, 1912.

No. 203, letter Menefee to E. Klein, December 3, 1910.

No. 204, letter Menefee to Klein, December 19, 1910.

No. 205, letter Menefee to Klein, January 24, 1911.

No. 206, LeMonn to Klein, January 28, 1911.

No. 207, copy letter Klein to company, April 15, 1912.

No. 208, carbon letter LeMonn to Klein, May 9, 1912.

No. 209, letter Klein to company, June 17, 1912.

No. 210, carbon letter to Klein, June 21, 1912.

No. 211, carbon telegram LeMonn to Klein, July 2, 1912.

No. 212, letter Menefee to Klein, July 23, 1912; indictment count No. 2.

No. 213, telegram Klein to company, July 31, 1912.

No. 214, copy telegram LeMonn to Klein, August 5, 1912.

No. 215, telegram Klein to Menefee, August 5, 1912.

No. 216, letter Klein to LeMonn, August 6, 1912.

No. 217, copy letter Menefee to Klein, August 9, 1912.

No. 218, carbon letter LeMonn to Menefee, August 12, 1912.

No. 219, syndicate agreement, dated August 28, 1912, with Dr. A. A. Milliken.

No. 220, letter Menefee to Dr. Milliken; indictment count No. 3.

No. 222, letter Menefee to Armstrong, October 18, 1912.

No. 223, Mrs. Zoeckler's subscription form, 50 shares, February 14, 1912.

No. 224, copy letter United States Attorney to stockholders, December 15, 1914.

No. 225, G. W. Steiner, check for \$300, April 15, 1913.

No. 226, G. W. Steiner receipt for \$300, signed by P. Muraine, April 5, 1913.

No. 227, certificate of stock No. 6127 for 10 shares to G. W. Steiner, April 7, 1913.

No. 228, certificate of stock No. 5930 for 50 shares to John Straub, February 20, 1913.

No. 229, certificate of stock No. 5931 for 50 shares to John Straub, February 20, 1913.

No. 230, two sheets containing data concerning stock sales out of Menefee special account.

No. 231, letter Menefee to J. W. Brett, July 24, 1913; indictment count No. 9.

No. 232, carbon letter LeMonn to Armstrong, February 29, 1912; indictment count No. 8.

No. 233, Rearick note for \$2800, February 17, 1913.

No. 234, contract between O. A. Campbell and Eugene Loan & Savings Bank, for the purchase of a payroll machine for the price of \$400, and providing for a refund of the purchase price, if for any reason the bank does not wish to use the machine.

No. 235, facsimile copy of check of Eugene Loan & Savings Bank for \$500, April 28, 1913.

No. 236, O. A. Campbell, deposit slip for \$500.

No. 237, deposit slip O. A. Campbell, February 24, 1913, for \$2800, being amount of notes of E. O. Tobey and John Straub, each for \$1400.

No. 238, check of C. M. McMahan to O. A. Campbell for \$300, September 29, 1911.

No. 239, letter of LeMonn to John Marshall, November 11, 1911.

No. 240b, circular to John Marshall, February 17, 1912; indictment count No. 11.

No. 241, Baker to Mears, August 19, 1914.

No. 242, letter Gernert to C. B. Clark, July 11, 1912.

No. 243, Gernert receipt to C. B. Clark, August 9, 1912, for \$2500.

No. 244, letter Menefee to C. B. Clark, August 19, 1912.

No. 245, letter Menefee to Clark, December 28, 1914.

No. 246, letter Menefee to Bockes, December 1, 1910.

No. 247, original letter LeMonn to Bockes, November 28, 1910.

No. 248, original letter LeMonn to Bockes, January 23, 1911.

No. 249, original letter LeMonn to Bockes, January 28, 1911.

No. 250, carbon LeMonn to Roles, June 2, 1911.

No. 251, carbon LeMonn to Campbell, June 10, 1911.

No. 252, carbon letter Menefee to Cloftin, July 10, 1911.

No. 253, carbon letter LeMonn to Sewall, November 9, 1911.

No. 254, carbon letter Menefee to Bonnewell, January 18, 1912.

No. 255, carbon letter Menefee to Moyer, January 22, 1912.

No. 256, carbon letter LeMonn to Bonnewell and agents, February 1, 1912.

No. 257, carbon letter LeMonn to Hunter and Hopson, February 2, 1912.

No. 258, circular to stockholders, February 17, 1912.

No. 259, carbon letter LeMonn to Armstrong, February 25, 1912.

No. 260, carbon letter LeMonn to Amsden, March 7, 1912.

No. 261, carbon letter LeMonn to William Baker, March 13, 1912.

No. 262, 262a, telegram Armstrong to Company and reply, March 20 and 21, 1912.

No. 263 and 263a, C. H. Nash to LeMonn, March 6, 1912, and reply, March 22, 1912.

No. 264, carbon letter LeMonn to F. E. Hall, April 13, 1912.

No. 265, carbon letter LeMonn to Bonnewell and others, May 4, 1912.

No. 266, 266a and 266b, telegram R. G. Hall to LeMonn, May 4, 1912, and LeMonn's reply by telegraph and letter May 6.

No. 267, letters LeMonn to agents, May 16, 1912.

No. 268, Dr. Nagle to LeMonn, May 15, 1912, and reply by Menefee, May 17, 1912.

No. 269, carbon letter Menefee to Jaynes, May 28, 1912.

No. 270 and 270a, Ruth Badger to company, July 10, 1912.

No. 271, carbon letter Menefee to Bank Examiner of Kansas, September 4, 1912.

No. 272, carbon letter Menefee to Dr. Nagle, September 30, 1912.

No. 273, carbon letter Menefee to Westerfield, October 8, 1912.

No. 274, carbon letter Menefee to Tillinghast, January 2, 1913.

No. 275, carbon letter Menefee to Abbott, January 2, 1913.

No. 276, 276a, letter LeMonn to First National Bank of Bend, Oregon, December 14, 1911.

No. 277, carbon copy letter Menefee to Barnes, Jan. 24, 1912.

No. 278, carbon letter Menefee to Abbott, January 25, 1913.

No. 279, original letter Menefee to Flatonia Bank, Flatonia, Texas, January 1, 1913.

No. 280, carbon letter Menefee to agents, February 13, 1913.

No. 281, carbon letter Menefee to Dix, March 11, 1913.

No. 282, carbon letter Menefee to First National Bank of Portland.

No. 283, carbon Menefee to Dix, March 24, 1913.

No. 284, carbon letter Menefee to Dix, March 26, 1913.

No. 285, reprint from Eugene Daily Guard, April 28, 1913.

No. 286, letter Menefee to Emma G. Hedges, Sept. 4, 1914.

No. 287, note given by J. W. Zufall to Gernert for \$50, December 9, 1911.

No. 288, original letter Gernert to LeMonn, February 24, 1912.

No. 289, carbon letter LeMonn to Gernert, March 2, 1912.

No. 290, carbon letter Menefee to Gernert, December 5, 1911.

No. 291, Gernert to Menefee, December 14, 1911.

No. 292, carbon letter Menefee to Gernert, December 9, 1911.

No. 293, copy contract with Gernert, Feb. 10, 1912, for working in California.

No. 294, carbon letter LeMonn to Gernert, March 2, 1912.

No. 295, carbon letter LeMonn to Gernert, March 22, 1912.

No. 296, Dr. Zener, subscription blank, November 16, 1911, for 25 shares.

No. 297, letter Menefee to Dr. Zener.

No. 298, carbon letter LeMonn to Gernert, June 5, 1911.

No. 299a and 299b, correspondence with Bear River Valley Implement Company.

No. 300, carbon letter LeMonn to F. E. Hall, March 1, 1912.

No. 301, 301b, inquiry from D. C. Harrington, Sioux Falls, N. D., March 2, 1912, and LeMonn's reply, March 9, 1912, with copy to Griffith.

No. 302, carbon letter LeMonn to Dr. C. S. G. Nagle, April 1, 1912.

No. 303, carbon letter to B. F. Bonnewell, October 19, 1912.

No. 304, carbon letter to C. G. Hall, October 31, 1912.

No. 305, 305a, 305b and 305c, pictures of the original photograph shown by Oviatt to Bullington in August, 1910.

No. 306, pamphlet advertising the Payograph.

No. 307, copy of letter Robb to Overlin, October 5, 1911.

No. 308, Osborne patent.

No. 309, picture of payroll machine with drum currency paying attachment.

No. 310, picture of currency paying machine.

No. 311, carbon letter LeMonn to Armstrong, November 4, 1911.

No. 312, carbon letter LeMonn to Griffith & Graham, December 7, 1911.

No. 313, carbon letter Menefee to Hunter & Hopson, Jan. 2, 1912.

No. 314, telegram Hunter and Hopson to Menefee, Jan. 11, 1912.

No. 315, carbon letter Menefee to Amsden, January 13, 1912.

No. 316, telegram Hunter and Hopson to company, Jan. 19, 1912.

No. 317, carbon letter Menefee to Amsden, Jan. 22, 1912.

No. 318, carbon letter LeMonn to Malthouse, Feb. 3, 1912.

No. 319, carbon letter LeMonn to Hall, February 6, 1912.

No. 320, carbon letter LeMonn to Hall, February 7, 1912.

No. 321, carbon letter LeMonn to Hall, February 21, 1912.

No. 322, telegram LeMonn to Malthouse, March 1, 1912.

No. 323, telegram Bonnewell to company, March 7, 1912.

No. 324, carbon letter LeMonn to Armstrong, March 8, 1912.

No. 325, carbon letter Menefee to Hunter and Hopson, March 14, 1912.

No. 326, circular Menefee to salesmen, March 14, 1912.

No. 327, telegram LeMonn to Hopson, March 22, 1912.

No. 328, carbon letter LeMonn to Moore and Muraine, April 30, 1912.

No. 329, b and c, telegram Hunter and Hopson to LeMonn, May 12, 1912.

No. 330, a, b and c, telegrams between Menefee and Davidson, July 27, 1912.

No. 331, carbon letter Menefee to Armstrong, October 2, 1912.

No. 332, carbon letter Menefee to Tillinghast, Jan. 22, 1913.

No. 333, telegram Menefee to Ford Dix, February 5, 1913.

No. 334, carbon letter Menefee to Davidson, November 10, 1913.

No. 335, telegram Hackney to Menefee.

No. 336, telegram Menefee to Armstrong, February 21, 1913.

No. 337, carbon letter Menefee to Dix, March 1, 1913.

No. 338, carbon letter Gloyd to Hunter and Muraine, March 17, 1913.

No. 339, carbon letter Menefee to agents.

No. 340, carbon letter Menefee to Amsden, May 13, 1913.

No. 341, telegram Dix to Menefee, June 9, 1913.

No. 342, telegram Menefee to Armstrong, August 23, 1913.

No. 343, certified copy patent No. 886,307.

No. 344, certified copy patent No. 1,114,574.

No. 345, certified copy patent No. 985,136.

No. 346, certified copy application for patent No. 555,552.

No. 347, certified copy application for patent No. 617,201.

No. 348, certified copy application for patent No. 658,434.

No. 349, certified copy application for patent No. 702,164.

No. 350, certified copy application for patent No. 710,512.

No. 351, certified copy application for patent No. 717,977.

No. 352, certified copy application for patent No. 729,093.

No. 353, certified copy application for patent No. 729,704.

No. 354, certified copy application for patent No. 742,958.

No. 355, certified copy application for patent No. 755,817.

No. 356, certified copy application for patent No. 767,335.

No. 357, certified copy application for patent No. 836,771.

No. 358, certified copy application for patent No. 838,065.

No. 358, certified copy application for patent No. 728,853.

No. 360, telegram Menefee to LeMonn, January 10, 1912.

No. 361a and b, telegrams between Menefee and LeMonn, April 17 and 18, 1912.

No. 362, original letter Baker to Menefee, May 4, 1913.

No. 363, original letter Baker to Menefee, May 6, 1913.

No. 364, carbon letter Menefee to Baker, May 10, 1913.

No. 365, original letter Baker to Menefee, May 14, 1913.

No. 366, carbon letter Menefee to Baker, May 17, 1913.

No. 367, carbon letter Menefee to Joseph Hunter, June 27, 1913.

No. 368, original letter Menefee to Robb, April 19, 1912.

No. 369, original letter Menefee to Robb, October 15, 1913.

No. 370, original letter Menefee to Robb, November 8, 1913.

No. 371, Advisory Board agreement with R. L. Glisan.

No. 372, certified copy of Bilyeu's admission as patent attorney.

No. 373, carbon letter Menefee to Lanning, January 4, 1911.

No. 374, circular to stockholders, June 1, 1911.

No. 375, circular Menefee to stockholders, June 28, 1911.

No. 375, carbon LeMonn to salesmen, July 15, 1911.

No. 377, carbon letter LeMonn to salesmen, August 9, 1911.

No. 378, carbon letter LeMonn to Sewall, August 16, 1911.

No. 379, carbon letter LeMonn to Armstrong, November 8, 1911.

No. 380, original letter Menefee to Robb, September 12, 1912.

No. 381, telegram Menefee to Gloyd, November 29, 1912.

No. 382a and 382b, telegram to agents, November 30, 1912.

No. 383, original letter Menefee to Gloyd, November 29, 1912.

No. 384, letter of Dix to Menefee, December 3, 1912.

No. 385, carbon letter Menefee to William Davidson, March 7, 1913.

No. 386, Kobusch contract.

No. 387, Losli subscription blank, September 5, 1910.

No. 388, Losli receipt for \$130, October 12, 1910.

No. 389, Losli receipt for \$100, November 9, 1910.

No. 390, Losli receipt for \$150, December 9, 1910.

No. 391, Envelope of George Losli on which he has written address of U. S. Cashier Company.

No. 392, original letter Menefee to Gloyd, December 20, 1913.

No. 393, original letter Menefee to Gloyd, December 23, 1913.

No. 394, original letter Menefee to Gloyd, December 26, 1913.

No. 395, original letter Menefee to Gloyd, January 15, 1914.

No. 396, carbon letter LeMonn to Bilyeu, February 23, 1911.

No. 397, carbon letter Menefee to Bilyeu, July 17, 1911.

No. 398, telegram Bilyeu to Menefee, July 19, 1911.

No. 399, statement to stockholders.

No. 400, original letter Menefee to Gloyd, May 17, 1913.

No. 401, statement to stockholders.

No. 402, carbon copy letter LeMonn to salesmen, Feb. 28, 1911.

No. 403, carbon copy letter LeMonn to Urquhart, Feb. 6, 1912.

No. 404, original letter Menefee to Roles, November 22, 1911.

No. 405, letter LeMonn to Menefee, April 6, 1912; and copy letter LeMonn to Schulmerich, April 3, 1912.

No. 406, letter Menefee to Baker, May 13, 1912, and copy letter Baker to Menefee, May 9, 1912.

No. 407, telegram Menefee to Bonnewell, August 8, 1912.

No. 408, copy letter LeMonn to Bonnewell, August 19, 1912.

No. 409, telegram LeMonn to Bonnewell, December 9, 1912.

No. 410, original letter Bonnewell to U. S. Cashier Company, February 1, 1912.

No. 411, original letter Bonnewell to U. S. Cashier Company, February 12, 1912.

No. 412, page 190, minute book No. II, United States Cashier Company.

No. 413, carbon letter LeMonn to Hunter, January 30, 1913.

No. 414, original letter LeMonn to Bauer, March 28, 1912.

No. 415, original letter Menefee to Johnson, August 19, 1912.

No. 416, carbon letter LeMonn to Bonnewell, April 7, 1912.

No. 417a and 417b, telegrams between Bonnewell and LeMonn, August 27, 1912.

No. 418a and 418b, telegrams between Menefee and Bonnewell, May 19, 1912.

No. 419, telegram Menefee to Amsden, June 5, 1912.

No. 420, copy letter Baker to Mears, May 19, 1914.

No. 421a, copy letter Baker to Mears, May 25, 1914.

No. 421b, copy letter Robb to Baker, May 21, 1914.

No. 422, copy letter Baker to Mears, May 26, 1914.

No. 423, copy letter Baker to Mears, Aug. 23, 1914.

No. 424, copy letter Baker to Mears, Apr. 11, 1915.

No. 425, copy letter Baker to Mears, Oct. 1, 1914.

No. 426, minute book United States Cashier Company.

No. 427, tabulated statement.

No. 428, original letter Menefee to Baker, July 16, 1914.

No. 429, original letter Hayes to U. S. Cashier Company, February 7, 1912.

No. 430, original letter LeMonn to Lepper, February 7, 1912.

No. 431, telegrams between Menefee and Roberts, March 7, 1912.

No. 432, telegrams First National Bank to U. S. Cashier Co., May 13, 1912; and replies from Menefee dated May 13, 1912, and telegram Hunter and Hopson to Menefee, May 13, 1912.

No. 433, circular from Menefee to stockholders, Oct. 13, 1911.

No. 434, (same as 374).

No. 435, original letter Menefee to Acheson and Bourke, March 14, 1913.

No. 436, original letter Menefee to Acheson and Bourke, April 4, 1913.

No. 437, tabulated statement.

No. 438, telegram White to Menefee, September 27, 1911.

No. 439, tabulated statement.

No. 440, letter to Gernert, March 12, 1912.

No. 441, carbon copy letters Menefee to Muraine, May 15, 1912, and Hunter, May 16, 1912.

No. 442, telegram, May 25, 1913, Menefee to Baker; letter Menefee to Baker, May 28, 1913; letter Baker to Menefee, May 27, 1913.

And the plaintiff offered testimony which was received and which tended to prove that the American Cash Record Company was a corporation organized

and existing under the laws of the state of Washington, and that during all of the times mentioned, specified stated in the indictment the defendant, Thomas Bilyeu, was the president and a director thereof, and was the owner of one-fourth of its capital stock; that the United States Cashier Company, on September 28, 1910, purchased from the American Cash Record Company applications for patent No. 555,552; No. 519,489 and No. 522,240, for a purchase price of \$200,000 in cash and \$60,000 of the stock of the United States Cashier Company; that from time to time thereafter and up to and including the year 1913, the United States Cashier Company made many cash payments to the American Cash Record Company and to the defendant, Thomas Bilyeu, and that the defendant Bilyeu, during these years, received in cash from the United States Cashier Company, on account of said contract, more than the sum of \$50,000; that in November, 1911, the United States Cashier Company purchased from the defendant Thomas Bilyeu certain patent rights covering the same applications for the republic of Mexico for the sum of \$15,000, but that the United States Cashier Company never did anything with any of these rights; that in June, 1912, the United States Cashier Company purchased from the defendant Bilyeu and one Overlin the rights to a currency machine that had been built by Overlin. The consideration of this purchase was that the company was to sell for Bilyeu and Overlin 1600 shares of stock owned by them and to pay them for the stock at the rate of \$12.50 per share.

There was evidence tending to show that the defendant Bilyeu saw the advertisements in the Oregonian,

Journal and Telegram referred to in this bill. The plaintiff offered evidence tending to prove that upon one occasion the defendant Bilyeu had assisted in the sale of the stock of the United States Cashier Company and had represented to the purchaser that the company owned the patents to all the machines which it was advertising and selling. The plaintiff offered evidence tending to prove that during all of the times mentioned in the indictment the defendant Bilyeu was a duly licensed and regularly admitted patent attorney.

But Mr. Bilyeu, being called as a witness and sworn, denied the foregoing facts, so far as they related to the sale of any stock by Bilyeu.

At the conclusion of all the testimony offered by both the plaintiff and THE DEFENDANTS, the court directed a verdict in favor of the defendant Bilyeu.

The plaintiff offered evidence which was received and which tended to prove that the defendants Menefee and LeMonn, for the purpose of inducing prospective purchasers to purchase the stock of the United States Cashier Company, had written letters to said prospective purchasers in which the statement was made that the patent office at Washington, D. C., could not give the company a single citation wherein the patents of the United States Cashier Company were infringing on any other patents previously granted and that the United States Cashier Company had made extensive research by the ablest patent attorneys in Washington, D. C., and that said patent attorneys had assured the

company that they had full protection for all time to come.

The following is taken from a circular letter dictated by Menefee and dated October 13, 1911:

“We also feel gratified in announcing that we are not only the absolute owners of our patents, but that we have not had the slightest intimation of trouble from any source in the way of infringement or otherwise. The patent office at Washington, D. C., could not give us a single citation wherein our patents were infringing on any other patents previously granted and we have also had made extensive research by the ablest patent attorneys in Washington, D. C., and they have assured us that we have full protection for all time to come.”

And the plaintiff offered testimony which was received and which tended to prove that prior to the time that said last mentioned letters were written and that during all of the times thereafter, John F. Robb, of Washington, D. C., was the patent attorney for the said United States Cashier Company; that prior to the time that Menefee and LeMonn had written the said letters stating that the patents of the United States Cashier Company did not infringe any prior issued patent, and that the patent office at Washington, D. C., could not give the United States Cashier Company a single citation wherein the patents of the said company would infringe on any other patents previously granted, and that the patent attorneys for the United States Cashier Company had assured it that it had full pro-

tection for all time to come, that the defendants Menefee and LeMonn had received from the said patent attorney, John F. Robb, written notice that certain prior issued patents, one issued to a man by the name of Lindeloff and two others issued to the National Cash Register Company, would be infringed by the applications for patents of the said United States Cashier Company, and that the application of the United States Cashier Company for the patent to the Bilyeu cashier and the application of said company for the patent to its computing machine would infringe said prior issued patents.

The following letter was written by Robb to Menefee on September 15, 1911:

“In conclusion, I beg to state that thus far in my infringement research, I have located one patent which is clearly infringed by the use of a certain feature of the change machine. The patent is within five years of expiration, and was granted to a foreigner. It is my purpose to consider carefully the desirability of acquiring the above patent in order to strengthen your protection, but will advice fully on this subject when I forward infringement report.”

On October 5, 1911, Robb wrote the Company as follows:

“I have not received as yet further advices supplementing Mr. Overlin’s night letter answered on the 26th of Sept. You will understand that I was interrupted in the infringement work by instructions in said night letter and would like to know

whether the report covering my work completed to date is to be sent or is it to be delayed until some further developments? I think this of grave importance because in the infringement search I have run across certain patents controlled by the National Cash Register Company which will affect our computing machine. Indeed, I believe that the portion of my report directed to the above matter may be the most important development of my work because it is probable that a consultation of your mechanical department and the officers of your company may have to be called to determine upon your future operations in the computing machine line. Unless I run across some other patents bearing on this line, the National Cash Register Company people have protection that may seriously interfere with us."

On the same day, October 5, 1911, Robb wrote W. S. Overlin, in part as follows:

"The most important thing that I have accomplished in the search so far has been the location of two patents in this art controlled by the National Cash Register Company and which will affect seriously our computing machine."

On February 26, 1912, Menefee wrote Robb, in part as follows:

"Will you kindly address a letter to Mr. Emil Welkey, No. 805 Blue Island Ave. Chicago, Ill., with reference to the protection afforded to us by

our patents. * * * Then would suggest that you go into the question of your research for the company and give him your opinion as to the strength of our position from a patent standpoint.”

On March 4, 1912, Robb wrote to Menefee as follows:

“In regard to letter sent Mr. Welky and referred to today in communication sent the company, we believe it well to bring to your attention personally that we have not referred in said letter to our infringement search because we could not give him much in the way of assurances of non-infringement, having in view the progress we have thus far made in our investigation. As a matter of fact, we have come across some five patents that will be infringed by your company in its operations, and the infringement of which might lead to serious complications later, so far as it is possible to anticipate at this time. We ignore in this connection some minor infringements that we do not believe will be of particular importance. We could not consistently advise Mr. Welky therefore that our infringement investigation indicated that your company will most likely not be interfered with in the marketing of your machines and therefore deemed it best to omit reference in this connection entirely.”

Under date of January 22, 1912, Robb wrote LeMonn in part as follows:

“Now as to possibilities, I have intimated in correspondence with Mr. Overlin, which has doubt-

less been brought to Mr. Menefee's attention, that we have run into National Cash Register Company patents for a starter, seriously from the view point of infringement, how seriously from the ultimate objective of validity of said patents cannot be indicated until a later stage of the proceedings. This situation was an important one we intended to bring to his attention. Have also located at least one patent of importance also infringed, and which will probably advise company to acquire. My correspondence with the inventor leads me to believe that this latter will present little difficulty."

These seven letters are the letters hereinbefore referred to relative to the said notice of the said infringements.

And the plaintiff offered testimony which was received and which tended to prove that during the times mentioned, stated and specified in the indictment, the United States Cashier Company received in cash from the said INVESTORS and many and divers other persons on account of the sale of capital stock to said persons in cash the sum of \$760,165; that it had disbursed over \$400,000 to its agents as commissions upon the sale of its capital stock; that the defendant F. M. LeMonn received a commission of ten per cent of all amounts received for the sale of said capital stock; that the defendant Frank Menefee received a commission of ten per cent upon said sales; that to the agent making the sale of said stock there was by said corporation paid a further and additional commission of thirty per cent on account of the sale of said capital stock; that approxi-

mately \$1,500,000 in cash and property were received by the said United States Cashier Company during said times on account of the sales of its capital stock; that no dividend was ever declared to any of the stockholders of said corporation and that the company was never in a position to declare or pay any dividend; that each, every and all of **THE DEFENDANTS** received large sums of money from the said United States Cashier Company over and above all of the amounts paid in to said company by them and each of **THE DEFENDANTS** made large profits during all of said times in selling and disposing of their own personal stock of said corporation.

That there was evidence tending to prove that all of the above sums of money received by Mr. Menefee were received by him under and by virtue of a contract which he made with the directors of the company about the time he became a stockholder and manager of the company, which contract was duly approved by resolution of the Board of Directors, and which contract was to the effect that he was to receive ten per cent of the amount derived from the sale of the stock of said corporation.

There was also evidence tending to prove that the defendant LeMonn, at the time of his first employment by the company, had a contract with the company by which he was to receive thirty per cent, and in a few cases thirty-three and a third per cent of the proceeds derived from the sale of the stock of the said corporation, which contract was duly approved by the board of directors.

And after the Government had called, to prove the foregoing facts, sixty-four witnesses, the plaintiff called N. C. Oviatt, as a witness, who, being sworn, testified that his name was Nelson C. Oviatt; that he lived at Detroit, Michigan, and was engaged in the manufacture of coin paying machines, called the Payograph, was President of the Payograph Company, which was a corporation organized under the laws of Michigan, incorporated for \$300,000, with the principal office in Detroit, and having machines manufactured for it in New Haven, Connecticut; that he was acquainted with the defendant Thomas Bilyeu, met him first in the summer of 1909, in the Ainsworth Block, Portland, Oregon; that the witness had been in Portland since 1892, first in the manufacture of silver spoons, later as an employee of Multnomah County, in the tax collection department, and later as coast agent for the Comptograph Company of Chicago, in the sale of adding machines, and also representing the Brandt Cashier Company in the sale of Brandt Automatic Cashiers. That he had devised the principles of a coin paying machine and had gone to Mr. Glover, a public engineer, with a view of having him develop it for the witness, but he was unable to do so, and that he presented it to Mr. Bilyeu; that Mr. Bilyeu took it under consideration, and after two days of deliberation said he would take it on, with the understanding that he would have forty per cent of the results, and that the witness was to have the other sixty per cent of the results; that the agreement was not in writing; that the witness was to turn over to Bilyeu his ideas, and Bilyeu was to proceed

with the development and put it into working shape, and build a model.

Thereupon the counsel for the defendants, Mr. Pipes, asked the District Attorney: "May I ask what the purpose of this evidence is?" And the District Attorney answered to the Court and jury: "The purpose of this evidence is to show that back in 1909, witness, Mr. Oviatt, was working upon a coin paying machine, and that he made a full and complete disclosure to the defendant Bilyeu; and we are going to then proceed to follow the making of the machine known as the Payograph, and the knowledge of the Payograph as it was brought home to the defendants, the attempted sale of a similar machine by the defendants in England, and their knowledge of the Payograph applications pending there; conversations had between Bilyeu and Menefee and LeMonn with this witness; bring these transactions down to the date where LeMonn made an investigation of the Payograph machines personally, and sent the telegram here that has been introduced in evidence."

Thereupon counsel for the defense, Mr. Pipes, asked: "For the purpose of showing that the Bilyeu patent is not good?" To which the District Attorney answered: "I don't know whether it will go that far or not, but it will go to the extent of showing the knowledge of the defendants of the work that Mr. Oviatt was doing."

Thereupon counsel for defendants interposed an objection to the said evidence, in the following language: "Now your Honor, I think I will interpose an objection

upon that statement of counsel. The allegation in this indictment is that there were representations made that the defendants, the Cashier Company, had certain patents. It did have a patent, which it got from its predecessors, and there is a record of the company, which is called the Bilyeu patent. Now, in this case, I take it that this court has no jurisdiction to try out the question between Mr. Oviatt on the one side, and Mr. Bilyeu on the other, as to who is entitled to that patent. That has been determined by the Department, and if there is an infringement or a conflict between Mr. Oviatt and this defendant, that is a matter to be settled by a court having jurisdiction to try it, and it doesn't seem to me that collaterally, in this case, the Government can attack a patent upon an allegation that we didn't have it. If we have got it, and had it, it was a true representation; whether it is good, or conflicts with somebody else's patent, or Mr. Oviatt's would depend, of course, upon the decision of the court in a suit brought for that purpose. For the purpose for which this evidence is offered, I make the objection. If it is admissible on any other ground, of course the counsel could state it, but upon the ground of showing that Mr. Oviatt and not Mr. Bilyeu is entitled to the benefit of that patent, and that Mr. Oviatt and not this company, is entitled to the benefit of the patent, which the company has got, we think that would be submitting to the jury a question that they ought not to have to try, because it might very well be said that, upon the evidence adduced in this case collaterally, if counsel is right in his contention, the jury might find that Mr. Oviatt had the better right;

I don't think they would, but they might, if it is competent for the evidence to be introduced; and yet upon a trial between them in a court having jurisdiction, it might be determined that Mr. Oviatt didn't have the better right; so you might have a decree in a criminal case, or a judgment in a criminal case, deciding against the defendant upon that issue collaterally; and it seems to me that ought not to be submitted to the jury, at least for that purpose."

To which objection and argument the United States District Attorney replied as follows: "Of course, your Honor will remember that at the beginning of the Government's case, we introduced in evidence a contract entered into between the American Cash Record Company, on the one part, and the United States Cashier Company, upon the other, by the terms of which certain patent rights alleged to be the property of the American Cash Record Company were sold to the United States Cashier Company. Now, one of the allegations in the indictment is that the stock in this company was worthless, and that these defendants knew it to be worthless. Now, anything that the Government could introduce that would tend to prove that this company, the United States Cashier Company, knew that what was being offered for sale had no value, would tend to sustain the allegations of the Government's complaint, that its stock was worthless. If the Government were able to prove that the United States Cashier Company was demonstrating machines, even for which they may have owned a nominal patent, when one of the defendants knew of the great and grave danger that

the company would experience whenever they proceeded to market or sell that machine, why, it seems to me that would be one element of fraud, and would go to substantiate the charge in the indictment that the stock of the United States Cashier Company was not of the value that it was represented to be by the defendants."

Thereupon the counsel for defendants, Mr. Pipes, asked the following question of Mr. Reames: "May I ask a question, Mr. Reames? Is this particular patent the one that you do not negative in the indictment?" and Mr. Reames answered: "Yes, the one that is not negatived in the indictment."

Thereupon counsel for the defendants made another objection, in this language: "Then there is another question that occurred in the early part of this case. The allegation is that the defendants represented that they had patents on all of these machines, whereas, in truth and in fact, the indictment says they had patents only on one. That is to say, this particular patent is not negatived, and that being so, I take it that that is an admission, and not a matter in issue in this case, as to the existence, and of course the validity of that patent. I take it that in an indictment, as in any other pleading, it is not sufficient to say that the representation is false, but it must be further shown by explicit allegation, in what respect it is false. Now, when it is said it was a false representation, in this indictment, that all these machines were patented, whereas in truth and in fact, the truth was that one of them was patented, or at least that there was no misrepresentation as to this

particular machine, I take it that that is not in issue, but that it is to be taken as true in this case, not subject to be determined by the court or jury, but admitted by the indictment that this patent was truly represented, and therefore it cannot be a false representation, and no evidence can be introduced that has the slightest tendency to show that this patent was not a perfectly good patent, because it was the duty of the indictment, of the District Attorney in drawing the indictment, if he meant to, to tender to the defendants an issue upon that, to notify us by making a proper allegation."

Whereupon the Court ruled upon the said objection in the following language: "I think in view of the indictment, that it must be conceded, for the purpose of this trial, if there was a patent, that the company had a patent to this particular machine. Further than that, I don't suppose in this trial that the validity of the patent that has been issued by the Government can be tried or determined. There is evidence in this case tending to show that LeMonn made a visit east along in 1912, and learned of this particular instrument, and that it was being manufactured, and that he sent certain letters and certain telegrams to Mr. Menefee with reference to this matter, and advised a certain course of procedure, which the evidence shows the company subsequently took, and for that purpose, I think this testimony of their connection with this patent is material in this case, to show their good faith."

Thereupon counsel for the defendants said: "I am content with this limitation, that these two matters will

be instructed to the jury that the patent is (not) in controversy."

And the Court said: "In this case I understand it is admitted in the indictment."

And thereupon Mr. Reames said to the Court: "Before your Honor passes finally upon that, I would like to leave that part and pass on a little further, and offer it again this afternoon, and offer some authority upon it."

Whereupon the Court said: "You can go on with the testimony, and later if it should be deemed material you can present the force and effect of it, but with that limitation, it will be admitted at this time."

There had been evidence as stated by the Court tending to prove that the defendant LeMonn had made a visit east in the early part of 1912, and learned of the manufacture of this particular instrument, and that he sent letters and telegrams to the defendant Menefee with reference to the matter, which letters and telegrams described said machine, stated that he, LeMonn, believed it to be a winner and advised the defendant Menefee to not sell any more of the capital stock of the company until the private stock of the defendants Menefee, LeMonn and Campbell had first been disposed of; that subsequent to the receipt of the said telegram the defendants Menefee and Campbell, at Portland, Oregon, caused the board of directors of the United States Cashier Company to pass a resolution withdrawing all of the company's stock from the market and authoriz-

ing the defendants Menefee, LeMonn and Campbell to sell their own personal stock with the sales organization or sales force and the demonstration machines of the company, and that was the certain course of procedure referred to in the Court's statement.

There was evidence also tending to show that the information concerning the above instrument in the said letters and telegrams had no connection with the advice by LeMonn to Menefee not to sell any more of the capital stock until the private stock of the defendants Menefee, LeMonn and Campbell had first been disposed of, and that the resolution withdrawing the company's stock from the market was not on account of any information they had in respect to the said particular instrument.

To the ruling of the Court admitting the said evidence upon the question of the good faith of the (A) defendants, the defendants, by their counsel, then and there excepted, and the Court allowed the exception.

And thereupon the testimony of the witness was continued, and he testified that he disclosed to Mr. Bilyeu the basic principle, which was the connection of each individual key with a selector bar or rod, so that by a depression of that key the proper ejector or ejectors would be turned from a non-paying to a paying position. That Mr. Bilyeu said he would undertake the work, with the understanding that the results would be divided sixty per cent to the witness and forty per cent to Bilyeu, and that was agreeable to witness, and that they shook

hands on it. That Mr. Bilyeu said to him, "I will take you out to my model maker," which he did, in South Portland, to Mr. Overlin; that he had not seen Mr. Overlin before, and that Mr. Bilyeu introduced him to Mr. Overlin and said that the witness had been associated with Mr. Potter in the development of the machine, and had not been treated properly by Mr. Potter; that witness had devised a machine of his own and arranged with Bilyeu to develop it, and wanted Overlin to undertake the manufacture of a model; that Mr. Overlin accepted, and they returned to town. That Mr. Bilyeu advertised for a draftsman, and put him to work in the Ainsworth Building; that the model was constructed, and that a month or six weeks after that time Mr. Bilyeu said to the witness one day that he had been thinking the matter over for a week past, and had decided that the witness did not own anything in the device, and went on to say that he had applied for a patent in his own name, and the witness said there was nothing further to do except for witness to make a better machine, and that Mr. Bilyeu said he could not do it.

The witness further testified that he went east the 2nd of May, 1910, and went first to the Comptograph Company, with sketches, and then to the Wales people, and finally arranged for the building of the machine, and completed it in August, 1910, and that was the Payograph machine. That he applied for a patent on the machine in August, 1911; that the first model was made in August, 1910; that the second model was completed in 1912.

The witness was then shown photographs of the exterior of the machine, and identified them as photographs taken in August, 1910, and of a machine he had just completed and demonstrated to the executive board of the Wales Adding Machine Company.

Thereupon the Government offered the three photographs in evidence, to which offer the defendants, by their counsel, objected, subject to the ruling of the Court.

But the Court overruled the objection, and the (B) defendants took an exception, which was allowed.

The witness then continued that he returned to Portland the latter part of August, 1910; that he knew of a certain machine of the United States Cashier Company, known as the Bank Cashier, had heard of it and seen it, but never examined it closely; that he thought the machine was one that was covered by the application over the names of Bullington, White and Overlin; that in the year 1910 he met Mr. Bullington, and that he exhibited the three photographs in evidence to Mr. Bullington, in August, 1910. That he had met the defendant F. M. LeMonn in the office of the Payograph Company, in Detroit, in January, 1912, and that LeMonn told him that he had been at the office of the National Cash Register Company, and had there been told of the Payograph; that LeMonn had a little booklet descriptive of the Payograph, which he said had been given to him by the Paymaster. Witness identified a book which he said was exactly like the one LeMonn

showed him; that it was issued by the Payograph Company, and that it was the one that Mr. LeMonn brought to him at the time, one exactly like it and of the same issue, and that LeMonn said he had received it from the National Cash Register Company.

Whereupon the plaintiff offered the said booklet in evidence, to which offer the defendants' counsel objected, for the same reasons thereinbefore stated in his argument.

But the Court overruled the objection and received the exhibit, which is Exhibit "306," and is attached to and made a part of this Bill of Exceptions, to which ruling of the Court the defendants duly excepted, and the exception was allowed.

The witness, continuing, said that the defendant LeMonn said that he had been told of the Payograph by the Paymaster, Mr. Myer, and wished to see it, and, after questioning by the witness, said that he had been with the United States Cashier Company, but was not with them at that time, had got through selling stock, and was East looking for other things to finance, and asked the witness if he did not want him to take hold of the Payograph, and finance it, which the witness said he did not. The witness said he demonstrated the Payograph to LeMonn; that Mr. LeMonn expressed himself as pleased with it, went on East, and left his address, with the request that the witness think over the matter of financing the proposition and communicate with him if they decided to take him on to do the work. That the machine he demonstrated to LeMonn was the one

described in the little booklet, that there was no model of it. The witness further said he took half an hour to demonstrate the machine; that the machine would pay money, list it and add it; that he did not take the case off the machine, the mechanical part of it.

The witness, further testifying, said that he met Mr. Menefee in October, 1913; that Mr. Menefee came to his office in October, 1913, and told him that he was the President of the United States Cashier Company, and asked what they were going to do with the British patents, or if the witness had sold them, and he said he had not; that Menefee asked what they were going to do with them, and he said he had no plans other than to retain them; that Mr. Menefee then told him they were arranging for a syndicate in Britain to take over their British rights, and that he felt that upon investigation by the people there they might run upon the application and it might possibly interfere with the deal, and that he thought for the good of both it might be well to make some arrangement whereby the patent of the Cashier Company in Great Britain would be included with the patent of the Oviatt machine; that Menefee described to him the deal; that it was to be a million dollar corporation, of which \$200,000 stock was to be paid to the United States Cashier Company, and \$50,000 in cash, which was to be divided between Mr. Bilyeu and the United States Cashier Company, and that if the witness would come into the deal it would be split in thirds. That Menefee wanted him to combine their entire interests in one large corporation. The witness said he took the matter under consideration, and afterwards, in

about two weeks, told Menefee he would not entertain the deal.

The witness further testified that subsequent to this conversation and at the request of the defendants Bilyeu and Menefee, he had met said defendants in Chicago and that they had attempted to get the witness to go in with them upon a proposition by the terms of which the Payograph was to be included in a deal that **THE DEFENDANTS** had pending in England and the two said defendants represented to the witness that on account of the conflict in Great Britain between the machine of the United States Cashier Company and the deal of **THE DEFENDANTS** could not be closed without the co-operation of the witness. The witness further testified that he refused to consider said proposition.

The witness further testified that the Payograph machine had been patented in the London Patent Office, and that the Payograph Company owned it. The witness was asked to demonstrate the Payograph machine, a model of which was in the court room, which he did, and said that the adding machine was not his invention, but that the coin paying device was his invention and was connected to the adding machine so that when the key was depressed and the handle of the adding machine operated, the money is ejected into the hand or an envelope, and fully explained the working of his machine. He testified that his machine was so constructed that the adding machine could be used with or without the coin paying mechanism, that they were detachable.

Upon cross examination by Mr. Atkins, of counsel for the defendants, upon the patent question, the question was asked: "Have you any claim allowed upon that broad feature of combination?"

Whereupon the witness answered: "We are at present in interference."

Mr. Atkins: That doesn't answer my question.

Witness: Well, I don't think that it is proper to go into the other side in this court.

Mr. Atkins: "I believe, your Honor, it is held that all questoins are open to investigation of the court in a matter of this sort, and that the secrecy which the Patent Office observes, is not observed when matters are brought into court."

Whereupon the Court said: "I suppose the witness can state where it interferes."

And the witness answered: "There are no claims actually allowed that I know of, that cover that feature, that are not an interference." And witness further said that there was an interference on that very feature.

Thereafter, and in the course of the trial, Mr. Dobson, of counsel for Mr. LeMonn, asked the District Attorney to have the Oviatt machine brought back into court, after Mr. Oviatt had been excused, and the next morning, at the opening of the court, Mr. Reames offered the said machine, stating that he did not claim the right to have it demonstrated, that the machine was to be shipped East, but that it was at the disposal of the defendants.

Whereupon, the counsel for these defendants stated to the Court that they did not desire to have the machine demonstrated and that the machine could be sent East as far as they were concerned, but one of the jurors requested that the machine be demonstrated, and thereupon the witness proceeded to demonstrate the machine by actually operating it by putting money into it and by manipulating it, having the money paid out in envelopes, according to its design and purpose, the said demonstration being made in the presence of the jury.

To further sustain the issues on its part, the plaintiff called E. D. Sewell as a witness, who, being sworn, testified that his name was E. D. Sewell; that he lived at Washington, D. C., and had lived there for twenty-five years; that he had been employed during that time in the United States Patent office, nine years in the examining corps, nine years and a half as Assistant Examiner, about the same period as Principal Examiner, and for the remainder as an Examiner of Classification. That the examining corps was made up of a number of men whose duty it is to examine every application for a patent, to determine its novelty, utility, and patentability generally; that the Principal Examiner is the man who has the power to grant or refuse the patent, and he is assisted by five or six or more Assistant Examiners, who usually make the examination as to the question of novelty, submit it to him, who then passes judgment upon it; that the Examiner of Classification is in charge of that division of the examining corps which controls the classification of the useful arts, and that the division is now engaged in reclassifying the entire

field of useful arts. Witness said that there are a very large number of patents, both United States and foreign, and a large number of applications which contain disclosures of machines and processes which are used in the industrial arts; that there are over one million United States patents, and the arts interlace to a very large extent; that no one could make a search in the brief period which is required in the Patent Office, unless these were divided up; that the Examiner in charge of the classification controls the reclassification which is now going on. That the witness supervised the bureau of classification, and prior to that time served as Principal Examiner.

The witness further testified that he had made an additional study of the science of patent law, had attended a course of law at Georgetown University, and a course of patent law in Columbia University; that he was a licensed and practicing attorney in the District of Columbia; that he had written articles relating to patent law that were published in law books and text books; that he wrote the article of patent law in the American Encyclopedia of Law. That he was qualified to examine certified copies of applications for patents and the files and records of the United States Patent Office for the purpose of telling the status of pending applications on file with the United States Patent Office; that he was familiar with the manner of keeping the file system and with the routine or procedure which a patent takes when it is filed in the Patent Office until it is finally granted or rejected. That when the application is filed the papers are sent to the application

room; the chief draughtsman then reviews the drawings for technical errors, poor execution and the like; that the application room makes up the filing wrapper, applies a serial number, and sees that all the papers which are required to be filed by law are there; then the application papers and specifications are assembled and sent by the Chief of the application room to the Examiner whom he thinks should examine it, for examination; after it reaches the Examining Division, the files are placed either in pigeon holes together, or they are distributed on to the desk of the particular Assistant whose duty it is to search the particular portion of the art to which that application belongs, and they are taken up in accordance with the rules of procedure. The Assistant Examiner reads carefully the specifications in connection with the drawings, to see that everything is correct, all the letters are properly placed, and there are no mistakes, to see that the apparatus or method claimed is operative, see that it is useful; then he reads the claims and makes any objections, notes any objections he might find to them of any sort, and then makes his search. In the examining division all the patents relating to the particular art which that division deals with are classified and kept in cases, shoe boxes, they call them, and the Assistant Examiner, using his knowledge of the classification, makes an examination and tries to find all the prior patents which seem to him to anticipate, or those which come the nearest to anticipating the invention defined in any claim, and when he has made his examination, searched the domestic patents and foreign patents, and the literature, he then notes anything that he thinks anticipates a certain claim, and it is presented to the

Examiner for his judgment. The Examiner then passes upon it and states whether he thinks it should be allowed or rejected, and directs the Assistant, as a rule, to write a letter carrying out his judgment, and the letter is written to the applicant. That the letter informs the applicant he is cited to patents that have been issued prior to the date of his application. After the citation to the applicant, he has an opportunity to amend, he may modify his claim, or he may insist upon it as he first presented it. When he has done that the Examiner reconsiders, in view of the amendment, and proceeds as before, and that course is followed until the application for patent is either allowed or rejected. That there are three appeals allowed from his rulings, one to the Examiner in Chief, one to the Commissioner of Patents, and one from the Commissioner of Patents to the Court of Appeals of the District of Columbia. That in ascertaining whether or not a person owned a patent, and how many patents they owned, and how many applications they had pending, it would be necessary to examine the books of the Assignment Division; that the assignment records are records kept in the Patent Office which show any transfer of any interest in any patents of any invention which may have been recorded there by the parties interested. They consist of several sets of books. In the first place, when the assignment is received, it is entered in order of date, the receipt in one book, which identifies the matter by the letter which accompanies it; then there is an index kept of these books, both in the name of the assignor and in the name of the assignee.

The witness testified that he had made an examination of the assignment records for the purpose of ascertaining the patents and applications owned and standing in the name of, upon the records of the Patent Office, the United States Cashier Company; that he made the examination from January 1, 1909, to December 31, 1914. The District Attorney then read to the witness a description of the Change Computing Machine for department stores, etc., from the advertisement appearing in the Oregonian of October 29, 1911, and of the Automatic Bank Cashier, a change making, listing and adding machine, and of the Change Computing Currency Paying Machine, and of the Lightning Change Maker, and of the Adding Machine, and the witness testified, in response to questions, that the United States Cashier Company did not own a patent to an adding machine, nor did it at the time of the examination of the witness; that the United States Cashier Company did not have an application on file for an adding machine on October 29, 1911, nor did it have an application on file on that date for the Lightning Change Maker described; that a patent for the Lightning Change Maker was issued July 6, 1915, and the number of the patent was 1,145,700. That there was no application for a Change Computing Machine by the United States Cashier Company on October 29, 1911, and that the United States Cashier Company does not own a patent for any machine designed to do that work. That the United States Cashier Company did not own any patents to any machine which was designed to compute change for department stores and all classes of retail business, as described in the advertisement. That on the 29th of October, 1911, the United

States Cashier Company had no application on file for any machine that would do that work.

The Court took a recess and the next morning the witness continued his testimony, and testified that from the 1st day of January, 1909, until the 31st day of December, 1914, the United States Cashier Company never did own patents to any of the machines described in the advertisement about which he had been asked. Upon inquiry by defendants' counsel as to what machines were included in the answer, the District Attorney answered, the four to which he had specifically called attention, the Lightning Change Maker, the Computing Machine, the Adding Machine, and the Bilyeu Cashier, with the paying and listing attachment. And the witness continued that the patent which was issued on the 6th day of July, 1915, about which he had testified, as shown by the record, was assigned to the International Money Machine Company, and witness presumed it was issued to them, to the Intenrational Money Machine Company; that it had been assigned by the United States Cashier Company. That the patent issued July 6, 1915, No. 1,145,700, was based on application No. 728,853, filed October 31, 1912, by W. S. Overlin; it was assigned to the United States Cashier Company, and by the United States Cashier Company to the International Money Machine Company, and that the patent issued direct to the International Company, by virtue of the assignment; that except for the assignment it would have issued to the Cashier Company. And the District Attorney admitted that it was by virtue of the assignment of the

United States Cashier Company that the International Company got the patent.

The witness then, from the patent record, stated a list of all the applications that had been filed, either on behalf of the United States Cashier Company, or assigned to the United States Cashier Company, and all patents that had been either issued to the United States Cashier Company, or issued to anyone else and assigned to the United States Cashier Company, from the year 1908 to December 31, 1914. That there had been two patents either in favor of the United States Cashier Company, or issued to another and subsequently assigned to the United States Cashier Company. The first patent was the Potter patent, No. 886,307, and then the design patent of Bilyeu, No. 43,401. That the Potter patent was issued April 28, 1908, and the inventor was T. I. Potter, and was assigned through mesne assignments to the United States Cashier Company, recorded April 12, 1912. The witness produced a certified copy of the patent issued to Thomas I. Potter on the 28th day of April, 1908, and the file wrapper, and he described the file wrapper as the jacket in which all the papers with the applications are enclosed, except the drawings, and on which is the serial number of the application, and a place left blank upon which the patent number is placed after the application is issued as a patent. It has the name of the applicant, place of residence, date of filing of all parts of the application, and a space for the signature of the Examiner who examines the application, and for the signature of the agent of the Commissioner, and various data, etc.

There was then offered in evidence, and received, by the United States District Attorney a duly certified copy of letters patent 886,307, issued to Thomas I. Potter, April 28, 1908, marked Government's Exhibit 343. The number of the application was 368,135, and it was filed April 15, 1907, and was assigned, through mesne assignments, to the United States Cashier Company, and transferred by that Company to the International Money Machine Company. That the purpose of this machine was to deliver a predetermined number of coins, of a predetermined value, from a series of coin tubes. Witness then explained the operation of the machine, and testified that there six claims in that patent, and they were limited to the organization, including in every instance selector plate with the openings and the ejectors adapted to pass through the openings, which are in line with them, and to be stopped in movement by the solid portions not in line.

That the next patent was Design Patent No. 43,401. The patent issued December 31, 1912, Application No. 709,824, applicant, Thomas Bilyeu. The invention was for a design for the casing for coin handling machines. That was assigned to the United States Cashier Company, and assigned by that Company to the International Money Machine Company. That the scope of a design patent did not define any structure in terms, but reads "Ornamental design for casing for coin handling machines, as shown," etc.

The witness testified that there were other applications and other patents that were issued to others, like

Thomas Bilyeu, and when the assignment was made assigned direct to the International Money Machine Company; that there were four of them, that there were eighteen applications and patents together, that were either issued to Mr. Bilyeu or to Mr. Overlin and assigned, or other persons in the United States Cashier Company, and assigned to the International Company. Of these eighteen applications there had been six patents issued and the other twelve applications were pending; that there were four where title never went through the United States Cashier Company, but assignment was made to the International Money Machine Company.

One of these was Patent No. 1,114,574, dated October 20, 1914; another was Patent No. 985,136, issued February 28, 1911, assigned by Overlin to Bilyeu, and by Bilyeu to the International Money Machine Company; another was Application 555,552, filed April 14, 1910, by Thomas Bilyeu, W. S. Overlin and F. A. Gridley, assigned by Overlin and Gridley to Bilyeu, and later by Bilyeu to the International Money Machine Company. Another was Application 617,201, filed March 27, 1911, by Bilyeu and Overlin, assigned by Overlin to Bilyeu, and by Bilyeu to International Money Machine Company. The latter application has been allowed by the Examiner, but not yet patented. That the record of the Patent Office failed to disclose that the United States Cashier Company ever had any ownership in any of these patents.

Another one was Application 519,489, filed September 24, 1909, patented October 20, 1914. Application

filed originally September 24, 1909, and this application became forfeited after the first allowance, and was renewed January 30, 1912, and was passed to issue and was patented September 14, 1914, to Thomas Bilyeu. The title of that invention was Change Making Machine, which was changed afterwards to Coin-Delivering Machine, and was patented so. The purpose of that machine was to deliver a predetermined number of coins upon the depression of a key and the operation of a handle. The witness identified the machine, and testified that the patent covers what was called the Bilyeu Cashier. That the machine comprises a frame with a series of coin holding tubes in front of it, some ejectors, the coin tubes having openings for discharging coins from the lower portion, an ejector for each coin tube; a means for operating the ejector, advancing each ejector, a bank of keys at one side of the coin tubes, that is, at the end of the machine; connections from these keys to the several ejectors so as to move or swing them into engagement with their operating arms, and a means to actuate the shaft and operate arms so as to advance these ejectors which had been connected by the keys.

The witness was then asked the following question: "Now, you have said in your examination yesterday that when an application is filed in the Patent Office, and the Examiner has made his search and finds something in conflict, or apparently in conflict, that those claims are cited and notice given to the applicant that certain claims are cited against him. Now, can you give to the jury the number of the prior patents that were cited against this Bilyeu Cashier?" "A. Yes, I have a note of that.

Fifteen patents cited during the prosecution of this application." Witness further said that one of the citations was a patent issued to a man by the name of Lindeloff, Patent No. 619,321, dated February 14, 1899.

Thereupon the District Attorney asked the witness the following question: "Are you able to say from that examination, as an expert in the science of patent law, whether or not the Lindeloff patent dominates the Bilyeu Cashier?"

Whereupon counsel for the defendants said: "Now, your Honor, may I ask the witness a question?"

District Attorney: Yes.

Mr. Pipes: Was the patent issued by the Department to Mr. Bilyeu?

A. The Lindeloff patent?

Mr. Pipes: No, the one you are speaking about.

A. Yes, that was issued to Mr. Bilyeu.

Mr. Pipes: By the Department?

A. Yes."

Thereupon counsel for the defendants said: "Now, your Honor, we object to going into it, to show whether or not some prior patent they did cite, upon which the Department has issued a patent, if anything conflicts with that. If it were so, it wouldn't have anything to do with this case, and then the court and this jury can't try that out here, it seems to me. This is something that took place in the Patent Office. These defendants made their application."

And counsel for the defendants asked the witness this question: "The Department cites this previous machine, doesn't it?"

A. Yes.

Mr. Pipes: That was considered by the Patent Department, and upon that patent was issued, and that is the only question we have here—was patent issued?"

Whereupon the United States District Attorney said to the Court: "It seems to me we have a much broader question than that to be submitted to the jury, in this: Witness has detailed that when an application for a patent is made in the Patent Office, a search is made by the Examiner, and if there are then patents which had been issued prior to that time which are apparently in conflict, those are cited, and the applicant is given notice and knowledge of them. Now, the fact that a patent may be issued to Mr. Bilyeu does not mean that he has any more right than he had before. It means that he has but one right, and that is to exclude others from making that particular thing in that particular way, but it does not mean that there is no one else that has a patent that would absolutely stop him from making that article. Now, when the Lindeloff patent was cited, and this applicant given notice of it, his attention was directly called to the Lindeloff patent, and to the fact, as we will show, that even if patent would issue that the patent of Lindeloff would absolutely dominate and control his patent, and that being so, if they then proceed after that time to sell stock in their company, with the representation that they were going to manufacture and sell these machines, why, then they were

committing a fraud against the general public, and against all people who should but that stock. That is the charge in the indictment, that these people were not engaged in the manufacture and sale of these machines, but that their entire business was to sell and dispose of their capital stock. Now, we contend that if we can show that it was brought to the attention of Mr. Bilyeu by this citation in the Patent Office that they couldn't market and sell this invention, even in the event that patent should issue, then the sale of this corporate stock to the public was wrongful, and it is our contention that the procuring of these patents in the limited way in which they were procured, limited to the specific mechanism, that they are absolutely dominated and controlled by the prior patent at that time, show they had no intention whatever to ever engage in the manufacture or sale of these machines. That is our contention. And we intend to continue, and show by this witness, that as to each of these applications that patents were cited against these applications as they were filed, and that these patents as cited, particularly the Lindeloff patent, showed that it completely dominated the patent which they were asking for. Now, that is the contention we have, to prove that they never intended to manufacture or sell these machines."

The witness then, pending the decision upon the objection, testified in response to questions by Mr. Atkins that the Lindeloff patent expired the next year, and upon this expiration would have no effect upon the Bilyeu machine, as far as dominating it was concerned, as a dominating patent.

The Court then ruled upon the objection as follows: "The controlling question in this case is one of good faith, and the Government charges that these people were not engaged in a legitimate enterprise, but were using it for the purpose of defrauding the public. Now then, if they had these patents, or pretended to have them, knowing at the time that they were not what they were representing them to be, and based upon that, insisted and represented that their stock was of a certain value, and was increasing in value all the time, and that they proposed to go ahead and manufacture these machines, it would come within the terms of this indictment, and would be a question that I think the jury have a right to consider, in determining whether they were acting in good faith in this transaction. If they were, then of course that is the end of the case. If not, and they come within the provisions of the indictment, and sustained by the testimony, they would be guilty of the charge against them. Therefore, I think the Government has the right to show that, notwithstanding these people had patents, if they knew at the time that their patents were invalid, and would not permit them to manufacture these machines, it is a circumstance going to determine whether they were acting in good faith, or not. It does not go to the validity of the patents. We are not trying that question. It goes to the good faith of the defendants, and for that reason I think the testimony is competent."

And the Court overruled the objection, to which (D) ruling the defendants, by their counsel, excepted then and there, and the Court allowed the exhibition.

Thereupon the witness, under said ruling, proceeded to testify, and, in response to questions, testified that the Lindeloff patent was issued February 14, 1899, which was cited against the Bilyeu patent. The witness said he had read the claims of the Lindeloff patent in connection with the machine shown and described in the Bilyeu patent, No. 1,114,574, and in his judgment the construction shown and described was within claims 1 and 2 of the Lindeloff patent.

The District Attorney then asked the witness the following question: "What would you say as a patent expert as to whether or not the claims numbered 1 and 2 of the Lindeloff as allowed, dominate and control these claims in the Bilyeu Cashier?"

And the witness answered: "These claims as allowed dominate the construction shown in the Bilyeu Cashier."

The witness then testified as to Patent No. 885,136, patented February 28, 1911, Application No. 522,240, filed by Thomas Bilyeu and William S. Overlin, and that the assignment record shows that this patent was assigned to Bilyeu, and by Bilyeu assigned to the International Money Machine Company. That there was no assignment to the United States Cashier Company in that record. That the purpose of this machine is the same as that of the patent to Bilyeu sole patent to Bilyeu, No. 1,114,574; that it seems to be a modification in detail of the patent first spoken of; that there was a change made in the character of the ejector, in this machine the entire ejector was moved laterally, to connect

it with the ejector operating means, while in the other machines the detail of the operation, selector bar and their connection to the ejectors were different. In this particular machine the keys were connected by bell cranks, and the bell cranks were connected to selector bars. The selector actuated bales which were hinged at their lower side, and their upper end connected to ejector bars, and served, when the selector bars were moved, to move the ejector bars into engagement with the operating means. Witness said he thought the differences were details of design to improve upon the machine as originally shown. That there was no claim for printing mechanism in that patent. The witness testified that the Lindeloff patent was cited against that application. That as an expert, in his judgment, the claims of the Lindeloff patent dominated this patent in the same way that they did the patent previously spoken of, the original patent.

Thereupon the following questions and answers occurred:

“Counsel for defendants: May I ask a question? When you speak about citing, do you refer to the patent? Your office refers to that previous patent?”

A. Yes.

Q. As a possible dominating feature?

A. Why, generally they make a positive rejection in view of that as meeting it, as anticipating the claim.

Q. Yes, they reject the patent?

A. They reject the claim to which that patent applies.

Q. Now, this patent you have testified about, it was issued and not rejected on that account?

A. Well, in the prosecution of an application through the Patent Office, the Solicitor and Examiner give information back and forth, until they finally got exactly what is thought to be patentable by the Patent Office.

Q. What I am getting at, when you do that in the office, do you deliver an opinion, a written opinion, or otherwise?

A. Yes.

Q. To the applicant, that he is not entitled to a patent, because there has been another patent prior to that already issued?

A. Yes, they make what they call a rejection, a refusal to patent.

Q. But, when you don't reject it, but issue a patent to the applicant, do you tell him that fact that there is a prior infringement, this Lindeloff patent?

A. No more than by simply citing the art, citing the patent.

Q. You don't give an opinion?

A. We don't express any opinion regarding the infringement.

Q. And you didn't in this case, when that patent was issued, express the opinion that you now express?

A. No, the statute regarding—

Q. Well, I am asking that question: Did you express—?

A. No, sir.

Q. —to Mr. Bilyeu what you are now saying about that patent?

A. Not as dominating, simply anticipating. That is the only question at issue there.

Q. That is a matter between the officers and the Department. I think with that explanation of the witness we are entitled to have the evidence stricken out.

Mr. Reames: I will clear it up. Now, the patent is cited, for instance the Lindehoff patent is cited, so notice is given to the applicant that the Lindehoff patent has been cited against his application.

A. A letter of rejection is written, in which that patent is identified, and the applicant is told that his claim is rejected in view of that patent, in anticipation.

Mr. Pipes: Now, when it is not rejected, then what?

A. Well, when it is not rejected, if it was not to be rejected on that patent, that patent would not be cited except in a friendly way, perhaps, to show what the prior art was.

Mr. Pipes: I would like to clear that up. I may be out on it.

Mr. Reames: Yes.

Mr. Pipes: This patent, this first patent you spoke about, was in fact issued to Mr. Bilyeu?

A. Yes.

Mr. Pipes: You now say that that patent is affected by the domination of a previous one?

A. I believe I said in my judgment Claims 1 and 2 of the Lindeloff cover the construction disclosed by the Bilyeu machine.

Mr. Pipes: That is your opinion now?

A. Yes.

Mr. Pipes: After examination?

A. Yes.

Mr. Pipes: A careful examination?

A. Yes.

Mr. Pipes: Without reference to this case?

A. Yes.

Mr. Pipes: At that time did you express to Mr. Bilyeu that opinion which you now express about the dominating control of his patent that was issued to him?

A. It may be that you are under a misapprehension, too, here. I didn't examine that application.

Mr. Pipes: You or anybody?

A. Nobody in the Patent Office is required to give any opinion regarding infringement.

Mr. Pipes: And it didn't in this case?

A. It didn't.

Mr. Pipes: I think I am entitled to have that out, for it didn't go to Mr. Bilyeu.

The Court: I understand they notified him of this prior patent.

Mr. Pipes: They didn't notify him of the witness' opinion as an expert, because it was not their duty to give him that information.

The Court: That is clear, but they did notify him of the patent, of the prior patent.

Mr. Pipes: Yes, they cited the patent.

The Court: And advised him of that, so he knew there was such a patent, and he took his own chances with reference to disposition.

Mr. Pipes: I suppose, for his information about that, but he didn't have the benefit of this witness' opinion that the jury has.

The Court: No, goes to the question of his good faith.

Mr. Reames: We will supplement it later by introducing duly certified copy of the record, showing that at this time Mr. Thomas Bilyeu was regularly and duly admitted to practice as an attorney before the Patent Office.

Mr. Pipes: I would like the record to show my motion to strike out that testimony, in view of the present testimony.

The Court: The record will show it. It will be overruled."

Thereupon the counsel for the defendants excepted to the said ruling, and the exception was allowed.

The witness then testified that there were thirteen patents cited in the Bilyeu patent, issued prior to that time, including the Lindeloff.

The witness then testified about Application 555,552, filed April 14, 1910, and gave the history of it; it was filed by Thomas Bilyeu, W. S. Overlin and F. A. Gridley, and still pending. This was assigned by Overlin and Gridley to Bilyeu, and finally to the International Money Machine Company, no assignment to the United States Cashier Company. The purpose of the invention was to cover another machine of the Bilyeu Cashier type, and was a modification or further improvement. The principal part of the improvement in this machine, as witness understood it, relates to the charac-

ter of the operating mechanism at one end of the machine. Instead of having an oscillating lever, as in other cases, or handle here, the lever made a complete rotation, and was adapted by its particular construction to operate the type of printing and operating mechanism which is shown in this case, but not claimed. There were also other improvements or changes in the connection of the selector bars which were operated by the keys to select the particular ejectors and move them into position to be operated to eject the coins. This was the patent that was at one time abandoned and revived by order of the Commissioner of Patents. There were ten patents cited against that.

The witness then took up Application No. 617,201, filed by Thomas Bilyeu and W. S. Overlin, on March 27, 1911. This was prosecuted to an allowance, forfeited by failure to pay the final fee, renewed, receiving as renewal number No. 30,673, and was again allowed on June 1, 1915, but has not yet been patented. There was an assignment of this case to the International Money Machine Company by the applicants, none to the United States Cashier Company. The purpose of this invention was to print a record of the amount of money delivered by the machine. There was at the rear of the keyboard a mechanism which was fed, which was adapted to feed a strip of paper, and there was a printing mechanism comprising a number of printing bars, equal in number to the number of rows of keys, so the printing bar had on it nine or ten numbers. On depression of any key for the selection of any particular coin or number of coins, there was a mechanism which

would throw up the printing devices, and let them drop down, the key pressing over a lever, which engaged in one of several stops, which are arranged on each type bar, so as to stop the fall of the type bar, so as to bring opposite the paper and in printing position the particular numeral which corresponds to the particular key depressed, so when the machine was operated to deliver any certain value of coins, the value of these coins was printed upon the slip by that operation. That there were eleven patents cited against this patent.

In application 658,434, filed by W. S. Overlin, assigned to the United States Cashier Company, and by mesne assignments to the International Money Machine Company of Terre Haute, Indiana, the filing was November 3, 1911. The title was a Machine for Handling Paper Currency. No patent had been granted. The purpose of this invention was to deliver bills, paper currency. The witness then described the machine as comprising one or more reels or drums, upon which the currency was wound or stored. On the drum was wound a strip of tape, and in storing the currency on the drum it was inserted between the tape and whatever came beneath the tape, the drum itself, or the next layer of tape. The drum had a spring inside of it, and there was a locking mechanism, pawl and ratchet mechanism, which by pressure of a key could be released so the spring would wind that drum up. The drum could be filled with bills properly spaced for delivery. After that was filled the mechanism could be operated against the tension spring in reverse direction, by pawl and ratchet mechanism; it was connected

to keys and an operating crank in a way very similar to the coin discharging machines which have been described. There were nine patents cited against this patent. One was a patent that had been issued to a man by the name of Cook. The Cook patent was No. 807,724, dated December 19, 1905. In the witness' judgment Claim 63 of the Cook patent includes the drum structure disclosed in this application, and dominates it.

Then there was taken up Application No. 702,164, filed June 7, 1912, the Bank Cashier. Counsel for defendant asked the following question: "If you are going to prove we have patent to it, I have no objection.

Mr. Reames: I may prove that.

Mr. Pipes: You can't prove anything else with my consent.

Whereupon the District Attorney said: "Now, if the Court please, we are at this point in the record, and I promised Judge Pipes I would call his attention when I came to the machine known as the Bank Cashier. It is my purpose to prove as a part of our case the complete patented protection that the defendants actually had, to prove what they had, and what they had upon certain specific dates as we go through; and now I have come to that machine known as the Bank Cashier, and as a part of that proof, I desire to show to the jury among all the patents and applications that are there pending or filed, the exact status of that application, what it consists of; the main purpose of it being to

show the exact assets of the company upon which they were selling stock."

Counsel for defendant then said: "Now, I don't understand counsel said he was going to dispute that we had a patent.

Mr. Reames: I am going to show the exact state of the record, and that will speak for itself.

Mr. Pipes: I think we have a right to ask counsel to speak before he puts the record in as to whether he intends to controvert that we have a patent on that machine.

Mr. Reames: Why, the record will show, if the witness is permitted to answer, that application is pending, patent not issued.

Mr. Pipes: On this particular one?

Mr. Reames: On this particular one, the Bank Cashier.

Mr. Pipes: Oh, we are in confusion about the name.

Mr. Reames: I think that has been the trouble all the way through. The machine I call the Bank Cashier is the machine right here.

Mr. Pipes: I will try to settle this controversy. You have drawn this indictment, and in this indictment you don't deny that we had a patent on an affair that is called in the indictment the Bank Cashier. Isn't that right?

Mr. Reames: No, I don't think that is correct. I admit you have a patent to the Bilyeu Cashier, but I deny that you have a patent to the Bank Cashier."

Thereupon counsel for the defendants read the indictment, where it recited that the defendants pretended and promised that the said corporation, namely, the United States Cashier Company, owned the patents to a certain change computing machine, a certain bank cashier machine, a certain lightning change maker, a certain currency paying machine, and a certain new style adding machine.

Whereupon Mr. Reames said: "I will admit there is one specific negative of that in the indictment that does not include the Bank Cashier. That was inadvertently left out of the indictment.

Mr. Pipes: I don't think that is right to say. I don't care whether inadvertently left out. It is left out.

Mr. Reames: It is left out. My fault.

Mr. Pipes: That refers and names it the Bank Cashier machine.

Mr. Reames: The Bank Cashier. But the indictment does charge that these people,—it is a part of the conspiracy that they would falsely and fraudulently represent, pretend and promise that they were the owners of the patents to these machines."

Whereupon counsel for the defendant said: "Now, that brings up a question, a good clean-cut question for your Honor to decide, whether or not it is sufficient in an indictment, any more than it is in a suit in equity, to charge a representation as being false. If I understand the rule of pleadings applicable to civil as well as criminal cases, when you allege a false and fraudulent representation, you haven't gone far enough by apply-

ing to it that epitaph of fraud vituperative. What you have to do, as I understand, in a civil or a criminal case, when you are depending upon false representations, is to state in what particular it is false; a false representation may not be fraudulent, and the mere designation of it by that adjective is not sufficient."

Thereupon Mr. Reames said: "I am willing to concede, for the purpose of this argument, although I don't believe it is the law, but for the purpose of this argument just concede that counsel's position is correct, nevertheless there is another reason why I am entitled to prove the exact status of the patent record, and that is this: It is charged in the indictment that these people were to represent and assure the public that the stock of this corporation was of great commercial value, and it is alleged in the indictment, whereas in truth and in fact, the shares of stock were perfectly worthless and of no value whatsoever. Now, I have proven certain allegations were made, that they were going to pay dividends, that the stock was of great value. Not only that, but I have proved that this stock was sold for three times par, \$30 a share, under representations that dividends would be paid upon an investment of that magnitude. Now, I desire to prove that this stock was of very little value, and practically worthless, and for the purpose of that I desire to prove just exactly what this corporation owned at the time that it was selling this stock. For that purpose alone, I believe I am entitled to prove just what they had."

And after further argument by counsel for defendant upon the question, the Court said: "I think there

is a reason why this testimony is competent, and that is, it has been shown in evidence that this company advertised at a certain time that they had patents to these certain named machines, they owned the patents to certain named machines. The evidence up to this time shows that they didn't have patents to some of these machines they were then advertising. Now, that was either an intentional misstatement, or it was an error of judgment and misinformation, and that becomes an important question, I suppose; it will be before this trial is through, for some triers of fact to determine in arriving at that question. I think the Government is entitled, in a case of this kind, where it depends on circumstances, to put in evidence other acts of a similar kind, transactions of a similar kind that happened at the same time. And when they advertised these machines the Government alleges they didn't have, they advertised another machine they didn't have at the same time, and it is for the Government to show the purpose and intent for which they advertised the machine, and for that reason I think it is competent. But I don't think for the purpose of showing that was one of the means by which the defendants intended to carry out that conspiracy. I think the Government is required in an indictment of this kind to negative those allegations, but it simply goes to the intent or purpose of the defendant."

Counsel for defendant said: "I will have the record show that, the part of it I am sure about is that the indictment, in effect and legal substance, alleges by admitting that that machine was patented, and that

no issue is raised between the indictment and the plea of not guilty on that question."

The Court said: "Go ahead with the testimony."

(F) And the Court overruled the objection, to which an exception was taken and allowed.

The next application taken up was Application 702,164, filed by Nelson White, W. S. Overlin and F. A. Bullington, filed June 7, 1912. The title of the invention was a Mechanical Cashier, Adding and Listing Machine; and that the patent had not yet been granted. It was assigned to the United States Cashier Company, and afterwards to the International Money Machine Company by the Cashier Company. The machine, as a whole, comprises an adding machine, typical adding machine with printing attachment, to print the amount separately and to take totals. It shows the operating handle for the machine, a typical adding machine. It shows a coin delivering mechanism at one side of the adding machine, the side opposite the handle; a series of coin tubes and ejector for each coin tube, and connections, whereby the operation of the adding machine keys may select the particular coins to be ejected, and the operation of the handle of the adding machine may bring about the printing, totalizing and ejection of coins. One important thing in this machine is the means whereby the adding and coin paying mechanism may be disconnected, so the adding machine may operate independently of the coin delivering machine mechanism, they may be used together or separately. The file wrapper shows that this application was placed in inter-

ference by one Nelson C. Oviatt, on the 29th of September, 1914. Twenty-four American patents and two German and two English patents have been cited by the examiners against that machine. One hundred and forty-seven claims were shown in the application. Of these claims three were made counts in the issue of interference, and disregarding these leaves one hundred forty-four. Of these twenty have been allowed and one hundred twenty-four rejected.

The next is application No. 709,824, filed July 16, 1912, which was a design patent. It was an application filed by Thomas Bilyeu, assigned to the United States Cashier Company, patented December 31, 1912. It was for the ornamental appearance of the casing of the coin delivery machine.

The next application was No. 710,512, filed by W. S. Overlin, for Money Paying, Changing and Listing Machine, filed July 19, 1912. It is the machine witness called the Computing Machine. It is the same machine which was identified by the witness Overlin upon the stand as the Computing Machine which he had built. No patent had yet been granted. That was assigned by Overlin to The United States Cashier Company, and by the Cashier Company to the International Money Machine Company. The purpose of the invention was to deliver coins of a value equal to the difference between an amount tendered and an amount to be deducted from it. The purpose was to provide a machine whereby, if it were used in a store as illustrated, and a ten dollar purchase should be made, and a twenty dollar gold piece

tendered in payment of that purchase, that by the depression of the proper keys, the exact amount of change, ten dollars, would be paid. There were twenty-one United States patents cited against that machine, and three English patents and two German patents. There were two patents to a man named Osborne cited against the patent, Osborne patent No. 864,185, dated August 27, 1907, and No. 982,853, dated January 31, 1911. The witness said he had examined the Osborne patent carefully; that it had been issued to the National Cash Register Company, Dayton, Ohio, as the assignee, from Osborne, the inventor. The Osborne patent is Government's exhibit "308." There were one hundred fifteen claims in the Osborne patent.

The District Attorney then asked the witness the following question: "Now, I wish you would make a comparison and show to the jury, I would like to have you do it carefully and in detail, whether or not this Osborne patent dominates and controls this change computing machine, and if it does so, in what manner it does it, and what claims there are in the Osborne patent that do it."

And the witness said that he found several which in his judgment included the construction of the machine shown here as the computing machine. The witness noted Claim 18 of the Osborne patent and read it: "Claim 18. In a change maker, the combination with a movable element, of means for actuating the same, according to the amount of the purchase, means for further actuating the same according to the amount re-

ceived to bring it to a position representing the difference between the two amounts, and a money changer controlled by said movable element." Claim 47 of the Osborne patent was as follows: "In a change making machine, the combination with a change making and ejecting mechanism, comprising a series of receptacles for different denominational amounts, means for controlling said mechanism selectively according to the amount of purchase and to the amount tendered in payment, and means for selectively actuating said ejecting mechanism to eject from the proper receptacle the difference between the two amounts." Claim 100 was: "In a change making cash register, the combination with two sets of manipulative devices representing desired amounts, of different computing mechanism controlled by both sets and automatically adjusted to the difference in amounts exhibited by the sets of manipulative devices." Claim 101 was: "In a change making cash register, the combination with two sets of manipulative devices, adjustable in correspondence with desired amounts, of subtracting mechanism, and operating means for automatically adjusting said mechanism to positions representing the difference between amounts exhibited by the sets of manipulative devices." Claim 102 was: "In a change making cash register, the combination with a change indicator, of two sets of manipulative devices, representing amounts and an operating mechanism for moving said indicator, differentially, to position to exhibit the difference between the amounts exhibited on said sets of manipulative devices." And the witness explained regarding that claim that the claim uses the words "a change indicator." In the Osborne

patent the change indicator has designations on it, and in the application under consideration we have the same mechanical part, but without designations on it, making the question whether that claim actually does infringe.

And the District Attorney asked the witness the following question: "From the other claims of the Osborne patent, what is your opinion in the science of patent law, whether those claims in your judgment are broad and basic?"

The witness answered: "In my judgment they are fundamental to this art."

"Q. What do you mean by fundamental?

A. That applicant alleged in his specifications that he was the first, as he believed, to construct a machine which would deliver change, the difference between the amount tendered and the amount purchased, for example; the Patent Office never denied that, and has never cited any patents prior to this which showed a mechanism for automatically selecting change, as it were, owing to positioning a bar differentially by two sets of mechanisms, and this patent seems to me to cover that very broadly.

Q. In other words, these claims you have read from the Osborne patent are, in your opinion, both broad and basic. What would you say as to whether or not they afford the owner of that patent basic protection?

A. In my judgment it would be extremely difficult for any one evade that patent without—to evade the patent. I think the only way he could escape it would be to invalidate it.

Q. How, can you tell from the study you have made of this Osborne patent, whether or not it was a carefully considered patent in the Patent Office, and what procedure it took in going through?"

And the witness answered that the patent was pending for sixteen years, and was finally passed upon and patent issued on August 27, 1907, and the life of the patent would be seventeen years from the date of that issue.

The foregoing testimony was taken and received over the objection of the defendants that it was not competent on the question of good faith, or for (G) any other purpose, to prove that the patents or applications involved could be affected by citations of a prior patent, and an exception was allowed.

The next application was No. 717,977, which was for chute gate for coin delivering machine, filed August 13, 1912, patented July 6, 1915, patent No. 1,145,727. This was a patent for a chute or spout for delivering the coin.

The next application was No. 728,853, filed by W. S. Overlin for money deliveries for street cars, filed complete October 31, 1912, patented July 6, 1915, patent No. 1,145,700. That machine is known as the Lightning Change Maker. This patent was assigned by Overlin to the United States Cashier Company, and by them to the International Money Machine Company. This machine differs primarily from the Bilyeu Cashier in that there is no operating handle here for operating

and discharging. The selecting keys, in the early part of their movement, select and move into position the ejector bars, and then by a further movement operate the ejector shaft so as to throw out the coins. In this machine, therefore, by the pressing of the proper keys, the proper amount of coin can be delivered. The machine, the witness said, was rather strictly limited to the specific mechanism employed. It was not new, as shown by patents cited during the prosecution of the case, to select and eject coin by depression of selector key, leaving out the operating handle. That seems to have been somewhat common. There were also one or two useful but minor improvements in the machine. The witness identified a machine on the table as the Lightning Change Maker, and said that the difference between that machine and other machines is that the selection is made by the depression of a key and the ejection made in the same way without any handle to operate it at all.

“Q. Now, explain to the jury fully whether or not at the time that application was filed, that art was new, or whether it was old, and tell the jury fully about that.

A. This is an old art. This application was filed October 31, 1912. Now, there is in the Patent Office a classification or class, designated Class 133, Coin Handling, which is made up entirely of mechanisms for handling coin, and it is in that art that this machine, the application for patent for this machine is classified. Now, there are several sub-classes in that class, directed to the mere discharge of coins singly, or in selective groups, as also there is in that class a sub-class devoted to the discharge of change, as in so-called computing

machines. I mean the difference, involving a subtracting operations, and that class has been in existence about, my recollection is about 17 years. Prior to the formation of it into a distinct class, it was a part of what was called measuring instruments.

Now, would the same mechanism, and in the same way, infringe the Lindeloff patents as it would in the other machines which you have described?

A. Not to the extent. My reading of the Lindeloff patent leads me to believe that the first claim of Lindeloff includes the construction of this machine.

Q. That is the patent that is practically expired at this time—will expire when?

A. In 1916.”

And the witness said that the patent to this machine was to issue to the International Money Machine Company, and was issued July 16, 1915, in the natural course.

(H) The above testimony was taken subject to the same objection, and the same exception.

The next application was No. 729,093, filed by Robert L. Bailey, for a Change Making and Computing Machine, filed November 1, 1912. It was assigned by Bailey to the United States Cashier Company, and by the Cashier Company to the International Money Machine Company. The application is still pending, no patent having been granted. The purpose of the invention is to deliver the difference between an amount tendered and an amount to be deducted therefrom, sim-

ilar in purpose, same in purpose as that of the Overlin Computing Machine which has been referred to hitherto. This application does not show the development of the idea carried to anything like the extent as in the Overlin machine. It hasn't the range of action of the Overlin machine, has a different mechanism, and, as far as the application shows, it had only two tiers of keys, and therefore had not been worked out to the same extent as the other one had been.

And the witness was asked the following question: "Now what have you to say as to your opinion in regard to this patent being dominated by the Osborne patent, whether or not this is the same as the other computing machine, and to the same degree?"

A. The machine shown in this application is within the claims of the Osborne patent which were formerly referred to.

Q. And dominated by it?

A. And cominated by it."

The above testimony was taken over the same objection and exception as the similar testimony on the infringement of prior patents.

Witness testified that there was a patent, No. 737,958, issued September 1, 1903, to one Pfeifer, which was cited against this patent. The witness said he had examined the Pfeifer patent, and in response to questions witness stated that the Pfeifer patent was issued to Mast, Foos & Company of Springfield, Ohio, and that eighteen claims of that patent, in witness' judgment, in-

cluded the construction of the Bailey machine as already shown.

(J) This testimony was taken over the same objection and exception.

The next application was 729,704, for Currency Paying and Computing Machine, filed by William S. Overlin, November 5, 1912, for a Mechanical Cashier, that being the official title. This was assigned to the United States Cashier Company, and by the Cashier Company to the International Money Machine Company, and no patent had yet been granted. This was an application for a machine designed to deliver either paper currency or coin, at the wish of the operator, one of those, a paper currency delivery machine having been referred to hitherto. That was a machine in which the paper currency was wound on a drum, between a tape and a drum. This one was designed to retain the currency in a flat condition, in piles, and to remove the top bill of any selected pile according to the selection made in the operation of the machine. The coin ejecting mechanism was substantially that of the Bilyeu type, that was applied to this machine, and it was combined in a certain definite relationship with the paper currency handling or ejecting mechanism. The coin ejectors were brought into engagement with their operating means by the depression of a key and movement of the handle, this causing the ejectment of these coins. Witness testified there was a connection from the crank handle to the means for operating for removing the currency from the top of the pile, and these currency re-

movals comprised arms hollow, with openings in them, and they were hinged to arms which projected upward from the machine; some device for creating suction through these arms was provided which made, when in place, an exhaust tank, or fan or pump, or anything of the sort which would cause a current of air to pass through these arms. There was a mechanism which could be connected to, or disconnected from the ejector operating mechanism, so that the bills need not be delivered in the operation of the machine, only the coin, and also, if you wished to deliver bills you could deliver bills without delivering any coin. The coin ejectors were not thrown out of operation in this machine, but fingers were projected to underneath the coin stacks, which lifted the coins as the ejectors came forward so that none would be ejected, only bills would be ejected. And the witness testified that that was new, but not in a broad sense, because there were in the art at that time money handling machines adapted to deliver both coin and currency, but that combination was apparently quite new, with the exception that they could not make claim to any broad idea of delivering both kinds, or either one of them. There were twenty-one patents, three of which were German, cited against that application.

(K) This testimony was taken over the same objection and exception.

The next application was No. 742,958, which was an application by Thomas Bilyeu, filed January 18, 1913, title, Paper Money Deliveries. A patent had not yet been granted. It was assigned to the United States Cashier Company, and by the Cashier Company to the

International Money Machine Company. The purpose of this was to deliver paper money. Witness described this machine, which is similar to the description of a similar machine before given, and said that the scope of the invention was rather broadly new. And the witness testified that in his opinion, and from his knowledge of the science of the law of patents, that application for a currency paper, filed January 18, 1913, by Mr. Bilyeu, patent not yet granted, contains rather broad claims that have already been allowed.

(L) This evidence was taken over the same objection and exception.

The next application was No. 755,817, filed by Nelson White, March 20, 1913, for Adding and Listing Machine, no patent yet issued. This was assigned to the United States Cashier Company, and by it to the International Money Machine Company. This was an improvement in adding machine, and did not, of course, claim to be broadly new, because the adding machine art is pretty old and the basic patents have expired. The public is free to make adding machines of certain types. This only pretended to be an improvement of certain details. There were twelve claims allowed, fourteen objected to as not being clear enough to be understood so that the Examiner could take definite action upon them, and there were twenty-two rejected. There was an amendment filed since that time on this application, but not yet acted on. This amendment cancelled thirty-five claims, amended two, and asked for reconsideration. The amendment was dated May 25, 1915, and its standing

now is that it is awaiting action on the part of the Patent Office. Against this application there were ten patents cited, one English, one German, and the others United States. The patents cited were Burroughs and Pike.

(M) This evidence was taken over the same objection and exception.

The next application was No. 767,335, filed by Thomas Bilyeu on May 13, 1913, for Paper Currency Paying Machine. No patent yet allowed. This was assigned to the United States Cashier Company, and by them to the International Money Machine Company. The purpose of this was to deliver paper currency in a flat condition, as in the other Bilyeu invention which we have referred to, and was a further advance in that particular art. The witness further described that machine, and said that the claims allowed in that application were, he considered, broad. There were eight prior patents cited against that application during the consideration of that patent.

(N) This evidence was taken over the same objection and exception.

The next application was No. 836,771, and was an application filed by Nelson White, May 6, 1914, for Ribbon Feeding Machine. This was assigned to the United States Cashier Company, and by the United States Cashier Company to the International Money Machine Company. No patent has been granted on this application, the last action having been a rejection, and no amendment yet entered in the files. This was an im-

proved mechanism for feeding an inking ribbon used in adding machines, typewriters, and other machines, and the witness described the invention. There were ten claims in the application, of which three specific ones had been allowed, and the other seven rejected. There were seven prior patents cited against this application.

(O) This evidence was taken over the same objection and exception.

The next application was No. 838,065, filed by Nelson White, May 12, 1914, for a Coin Delivery Machine. No patent yet issued on the application. It was assigned to the United States Cashier Company, and by them to the International Money Machine Company. This was a machine designed for the same purpose as the so-called Lightning Change Maker. It was a complete reorganization, different organization. It was broadly to select and discharge coins by the depression of a key. The keys in this machine were stretched across the front of the machine, instead of being on the side, and it had a locking device which was adapted to lock the keys so that nobody could operate them, and at the same time lock a cover on the front of the machine so that nobody could get to the coin chutes, a key performing the locking operation, that is, a key which could be carried in the pocket, formed the locking operation for both the discharge keys and the front of the machine. There were originally twenty-five claims in this application, of which three had been allowed and the others rejected. One allowed claim relates to the locking mechanism which was described, and the other two affected the closure of the coin chute, which witness had not referred

to in his description of the machine. That the file wrapper showed there had been an amendment made of these claims, filed June 7, 1915, and no action yet taken on the part of the Patent Office. There had been eleven prior patents cited by the Patent Office in relation to this application.

(P) This evidence was taken over the same objection and exception.

And the District Attorney asked the following question:

“Q. Now, in your testimony today you have frequently been asked as to how many claims were cited against certain applications, that were pending for patent. Can you tell the jury something about the classification of those patents that have been cited, the broad classification in the Patent Office, and to what general scope of the art they relate?”

And the witness answered: “Yes,” and proceeded to testify that he made a note of the different classes which had been referred to, that the principal class is Class 133, entitled Coin Handling, and that has been in existence some sixteen years, and was formerly part of another class. There were fifteen sub-classes and this Class 133 is divided and segregated into many sub-classes, into fifteen sub-divisions.

The Government then offered in evidence, and it was received, a duly certified copy of Patent 1,114,574, granted to Thomas Bilyeu, October 20, 1914, for improvement in Coin Handling Machines. This was

marked Government's exhibit "344." Also a duly certified copy of Patent No. 985,136, granted February 28, 1911, to Thomas Bilyeu and W. S. Overlin, improvement in Coin Deliveries, Government's exhibit "345." Also a duly certified copy of pending application of Bilyeu, Overlin and Gridley, filed April 14, 1910, No. 555,552, for improvement in Coin Delivering Machines.

Counsel for defendants asked Mr. Reames: "Does that show in what condition the pendency is in, as to whether claims have been allowed?"

Mr. Reames answered: "Up to the date of the certificate, it did." And he said the date of the certificate was January 19, 1915. And the District Attorney said that while his certified copies of these applications that are pending, some of them, are not certified to of very recent date, but in those instances they had the original file wrappers showing what was done, if anything, since the date of the certificate. This was marked Government's exhibit "346." And counsel for the defendants agreed that the file wrappers should be returned to the Department, but that the information should be copied into the record of any action taken since the certified copies were made, and that was agreed to.

The Government offered in evidence, and it was received, certified copy of pending application of Thomas Bilyeu and W. S. Overlin, filed March 27, 1911, Serial No. 617,201, improvement in Record Mechanism for Coin Delivery Machines. This was marked Government's exhibit "347."

The Government offered, and it was received in evidence, a duly certified copy of pending application of W. S. Overlin, filed November 3, 1911, Serial No. 658,434, improvement in Machines for Handling Paper Currency. This was marked Government's exhibit "348."

The Government offered, and it was received in evidence, a duly certified copy of pending application of White, Overlin, Bullington, filed June 7, 1912, Serial No. 702,164, improvement in Mechanical Cashier, Adding and Listing Machines. Government's exhibit "349."

The Government offered, and it was received in evidence, a duly certified copy of pending application of William S. Overlin, filed July 17, 1912, Serial No. 710,512, improvement in Money Paying, Changing and Listing Machines. Government's exhibit "350."

The Government offered, and it was received in evidence, a duly certified copy of pending application of Nelson White, filed August 30, 1912, Serial No. 717,977, improvement in Chute Gates for Coin Delivery Machines. Government's exhibit "351."

The Government offered in evidence, and it was received, a duly certified copy of pending application of Robert L. Bailey, filed November 1, 1912, Serial No. 729,093, improvement in Change Making and Computing Machines. Government's exhibit "352."

There was offered and received in evidence a duly certified copy of pending application of William S. Overlin, filed November 5, 1912, No. 729,704, improve-

ment in Mechanical Cashiers. Government's exhibit "353."

There was offered and received in evidence a duly certified copy of pending application of Thomas Bilyeu, filed January 18, 1913, No. 742,958, improvement in Paper Money Deliveries. Marked Government's exhibit "354."

There was offered and received in evidence a duly certified copy of pending application of Nelson White, filed March 20, 1913, No. 755,817, improvement in Adding and Listing Machines. Government's exhibit "355."

There was offered and received in evidence a duly certified copy of pending application of Thomas Bilyeu, No. 767,355, filed May 13, 1913, improvement in Paper Currency Paying Machines. Government's exhibit "356."

There was offered and received in evidence a duly certified copy of pending application of Nelson White, filed May 6, 1914, No. 836,771, improvement in Ribbon Feeding Mechanism. Marked Government's exhibit "357."

There was offered and received in evidence a duly certified copy of pending application of Nelson White, filed May 12, 1914, No. 838,065, for improvement in Coin Delivering Machines, Government's exhibit "358."

Thereupon the District Attorney asked the witness the following question: "Now, one part of your testimony I would like to have clear in the minds of the jury,

Mr. Sewell, relative to the search that you made as to the ownership of patents, and patent applications upon the part of the United States Cashier Company. Now, have I produced here and introduced in evidence certified copies of all applications pending in the United States Patent Office that have been assigned to the United States Cashier Company, together with certified copies of all patents issued to the United States Cashier Company, together with certified copies of the applications and patents that were assigned to the International Money Machine Company, between the dates of January 1, 1909, and December 31, 1914?

A. Four applications assigned—four patents and applications assigned to the International Money Machine Company direct from Mr. Bilyeu, and fourteen applications assigned to the United States Cashier Company, and subsequently to the International Money Machine Company.”

The witness stated that the design patent of Mr. Bilyeu had not been introduced, but that the witness had been examined upon that.

Counsel then said: “So that I have examined you upon all of the patents that have been issued, either to the United States Cashier Company, or issued to any one else, and assigned to the United States Cashier Company, or issued to the United States Cashier Company, and assigned to the International Money Machine Company?

A. I believe you have, sir.

Q. And as far as your search and examination of the records in the Patent Office discloses, this is all?

A. Yes, sir."

Later the Government offered, and there was received in evidence, pending application of William S. Overlin, filed October 31, 1912, No. 728,853, for improvement in Money Deliveries for Street Cars and Lightning Change Makers. This was Government's exhibit "359."

There was evidence tending to show that about January, 1914, the defendant Menefee, and the other officers and directors of the United States Cashier Company, finding that the manufacture of the machines at Portland, where a factory had been established and had been in operation, was not satisfactory and economical, and that it lacked capital, caused to be organized and incorporated the International Money Machine Company, at Terre Haute, Indiana, and had procured additional subscriptions to the capital stock of that corporation; that an arrangement had been made by which the United States Cashier Company transferred to the International Company substantially all of its assets in Oregon, and had effected a contract with the International Company and promoters, by which the United States Cashier Company received something more than fifty per cent. of the paid up stock in the International Company, and that the design and purpose of the defendants and officers of the United States Cashier Company was to continue the manufacture of the machines which they had commenced to manufacture and to conduct the business in Terre Haute, Indiana, and that that

Company had proceeded, and at the time of the trial was proceeding to manufacture and sell one of the machines involved, and for which an application for a patent was pending to the International Money Machine Company. One of the machines recently manufactured by the Indiana Company was used in evidence and demonstrated in the presence of the jury to show its workings.

And there was evidence tending to show that the assignments made of the applications and patents by the several persons named in the foregoing testimony had been made by the applicants or by the Cashier Company to the International Money Machine Company as a part of the assets of the Cashier Company, under the arrangements and contract hereinbefore referred to.

There was some evidence by several of the stockholders of the United States Cashier Company to the effect that they had not been notified and had not consented to the transfer of the assets of the Cashier Company, and to the arrangement that had been made by the Directors.

At the close of the case, and in due time under the rules of court, the defendant asked the Court to give the following instructions:

I.

The fundamental question in this case is the good faith of the defendants in respect of the enterprise of manufacturing and selling the machines described in the indictment and in the evidence. If they honestly intended to establish a business to manufacture and to sell

the machines, in the belief that the business would be profitable to the corporation and its stockholders, you cannot find them guilty of the charge in this indictment. Or, if you have a reasonable doubt about that, you must give the defendants the benefit of that doubt and acquit them.

II.

The fundamental question in this case is the good faith of the defendants in respect of the enterprise of manufacturing and selling the machines described in the indictment and in the evidence. If they honestly intended to establish a business to manufacture and to sell the machines, in the belief that the business would be profitable to the corporation and its stockholders, you cannot find them guilty of the charge in this indictment that the United States Cashier Company was not engaged in either the business of manufacturing or selling said machines or any thereof.

III.

You cannot decide in this case that the patent of Osborne or Lindelof or Cook dominated or affected injuriously any patent issued Bilyeu and Potter, or claims allowed by the Patent Department of the United States to the defendants or the United States Cashier Company or which were assigned to said Company.

IV.

Any representations made by the defendants that they had procured a patent that they did in fact procure

or had claims allowed that were in fact allowed, cannot be found by you to be a misrepresentation.

V.

Bad faith or fraudulent misrepresentations cannot be imputed to defendants in respect of patents they in fact procured or in respect to claims that were in fact allowed because of claims of infringement of prior patents by other persons that were made or might be made, and there is no competent evidence in this case that any such infringement in fact exists.

VI.

In respect to the last instruction, I instruct you that the opinion of the witness Sewell that the Osborne patent dominated the construction of the defendants' patents or machines constructed thereunder, is not competent evidence that it does in fact dominate them or affect them, and that you are to disregard that evidence.

Winans v. New York R. R. Co., 21 How. 98,
101.

Corning v. Burden, 15 How. 252; 20 U. S. 503,
508.

VII.

A representation to be fraudulent must not merely be false, but must have been made in bad faith, and with the fraudulent intent to deceive to the injury of the person to whom the representation was made.

VIII.

Honest mistakes or errors of judgment in respect of patents or patent claims or patent situation cannot be imputed to defendants as evidence of bad faith or of a fraudulent purpose.

IX.

Honest mistakes or errors or mis-statements inadvertently made without a fraudulent purpose, in respect to any of the matters disclosed in the evidence, even though they are material, are not fraudulent.

X.

There is a presumption of law when patent is issued by the Department that it does not infringe any prior patent.

Miller v. Eagle, 151 U. S. 208; 14 Sup. Ct. 310, 319.

Ransome v. Hyatt, 69 Fed. 148. Opinion by Judge Gilbert holding it was error to refuse instruction that the issuance of a patent creates a prima facie presumption of a patentable difference from complainant's patent.

Miller v. Eagle, *supra*, and
Boyd v. Pool Co., 15 Sup. Ct. 837.

XI.

Expert evidence is not competent to rebut the prima facie presumption that the patents obtained by the defendants and the Cashier Company do not infringe the

prior patents mentioned in the evidence, and you are to disregard the evidence of Mr. Sewell to that effect, and you are to find in accordance with the *prima facie* presumption that the said prior patents are not infringed by any of the patents obtained by the defendants and the Cashier Company.

Cases *supra*.

XII.

The issuance of a patent by the Department is a decision of the officers of the Department charged with that duty, that the patent does not infringe any prior patent and the patentee, in accepting the patent, is not thereby guilty of bad faith, but on the contrary his good faith must be presumed.

Cases *supra*.

And thereafter the Court instructed the jury in full as follows, which are all the instructions that the Court gave to the jury:

“You are to be congratulated that your labors in this case are about to end. You have sat here through a long and protracted trial, listening to the testimony and the arguments of counsel, and their construction and application of the testimony. I now ask your careful attention while I attempt to state to you the issues you are to determine and the rules of law by which you are to be guided in arriving at your verdict. When I have done this, the duty of the court in this case ends, and the responsibility rests with you.

“The defendants Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine, and Oscar A. Campbell have been jointly indicted by the grand jury of this district charged with having entered into a conspiracy to commit an offense against the United States by violating what is commonly known as the Postal Fraud Statute. The defendants Hunter, Hopson, and Muraine are not on trial. The court has sustained a motion for a directed verdict as to the defendant Bilyeu, on the ground that no substantial testimony was offered by the Government to connect him with the conspiracy charged in the indictment, and therefore, whatever conclusion you may come to as to the other defendants, it will be your duty to return a verdict of not guilty in favor of the defendant Bilyeu.

“The indictment is based on Section 37 of the Federal Penal Code, which, for the purposes of this case, provides that, if two or more persons conspire to commit an offense against the United States, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties thereto shall be guilty of a crime and punished accordingly. It is important, therefore, at the outset that you have a clear conception of what constitutes a crime under this section, and of the evidence necessary to establish it. I therefore repeat the statute: It is that, if two or more persons conspire to commit an offense against the United States, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties thereto shall be guilty of a crime.

“You will observe that there are three essential elements necessary to constitute a crime under this statute. First, there must be the act of two or more persons conspiring and confederating together. One person cannot conspire with himself, and therefore there must be at least two persons acting together in order to constitute a conspiracy. Second, it must appear that the purpose of the conspiracy was to commit an offense against the United States, that is, to violate some law of the United States. And, third, one or more of the conspirators, after the conspiracy has been formed, must do some act to effect the object thereof. Each of these elements is an essential ingredient of the crime charged, and must be established by the Government, to your satisfaction beyond a reasonable doubt, before you can find a verdict in its favor.

“Now, taking them up in their order: A conspiracy is a combination of two or more persons, by concerted action, to accomplish a criminal and unlawful purpose, or some purpose not in itself unlawful or criminal by criminal or unlawful means. A common design is the essence of a conspiracy, and it is therefore necessary, in order to prove a conspiracy, for the Government to show a combination of two or more persons, by concerted action, to accomplish a criminal purpose. It is not necessary, however, for the Government to prove that such parties met together and entered into an explicit or formal agreement to that effect, or that they directly, by words or in writing, stated what the unlawful scheme was to be, or the details of the plan or means by which it was to be made effective. A conspiracy may be, and

usually is, shown and proven by circumstances. Persons who contemplate committing a crime do not ordinarily place their intentions in writing, nor enter into any formal agreement for that purpose; but their agreement or understanding is generally to be determined from their acts and conduct and the entire circumstances surrounding their relationships and transactions.

“Guilty connection with a conspiracy may be established by showing association of the persons accused in and for the purpose of prosecuting the illegal object. It is enough if the minds of the parties meet understandingly so as to bring about an intelligent and deliberate agreement to do the act and commit the offense charged, although such agreement be not manifested by formal words.

“While a conspiracy may be proven by circumstantial evidence, yet the circumstances relied on for the proof must be such as to show that there was a common agreement or understanding, and the mere fact that two or more persons, on different occasions, did acts of a similar nature looking toward the same end or result, would not constitute, as a matter of law, a conspiracy, unless there was a common design and intention. The evidence must show that the parties accused, and each of them, agreed and confederated together to do the acts charged.

“Each party to a conspiracy must be actuated by the intent to promote the common design, but each may perform separate acts, or hold distinct relations, in promoting such design. Thus, if two persons pursue by their

acts the same object, by the same means, one performing one part and the other another part, so as to complete it, with a view to attaining the object they are pursuing, that will be sufficient to constitute a conspiracy. Nor is it necessary that the conspirators should be acquainted with each other, or that each should know the exact part to be performed by the other in the execution of the common design. It is enough if two or more persons, in any manner or through any contrivance, positively or tacitly come to a mutual understanding to accomplish a common unlawful design. In other words, where an unlawful end is sought to be effected, and two or more persons, actuated by a common purpose to accomplish that end, work together in any way in pursuance of the unlawful scheme, every one of such persons becomes a member of the conspiracy, although the part that he was to take therein was a subordinate one, and was to be executed at a remote distance from the other conspirators.

“Again, one who, after a conspiracy is formed, with knowledge of its existence, joins therein and aids and participates in its execution, becomes as much a party thereto from that time on as if he had been an original conspirator. Furthermore, where two or more persons are proven to have combined and confederated together for some illegal purpose, any act done by one of the parties, in furtherance of the common design and with reference to the common object, is in law the act of all, and therefore proof of such act will be evidence against any of the others who are engaged in the same conspiracy.

“It is also true that any declaration by one of the parties, in furtherance of the conspiracy or in execution thereof, during the pendency thereof, is not only evidence against himself, but evidence against the other parties, who, when the conspiracy is formed, are as much responsible for such declarations and acts to which it relates as if made or committed by them. This rule applies to the declarations and acts of a conspirator although he may not be under prosecution or on trial. His declarations are equally admissible with those of the parties under indictment and being tried. But the declaration of a conspirator not in execution of the common design, or merely narrating past events, is not evidence against any of the parties other than the one making such declaration.

“One cannot be made a member of a conspiracy except by his own conscious act, and not by the acts and declarations of another.

“The second essential element of a conspiracy, so far as the case in hand is concerned, is that its purpose was to commit an offense against the United States.

“The law in force at the time it is alleged the conspiracy charged in the indictment was formed and existed provides that whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations or promises, shall, for the purpose of executing such scheme or artifice or attempting to do so, place or cause to be placed any letter, postal card, package, writing, circular, pamphlet, or advertise-

ment in any postoffice, to be sent or delivered by the postoffice establishment of the United States, shall be guilty of a crime and punished accordingly.

“It is this statute the defendants are charged with having conspired to violate.

“The postoffice establishment of the United States is a public agency, created and maintained by the Government at public expense, for the convenience of all the people. It is important, therefore, that this agency should not be used for the purpose of promoting fraud, and Congress has passed the law to which I have called your attention prohibiting such misuse of the mails, and it is the duty of courts and juries to enforce this statute whenever and however violated.

“To devise, within the meaning of this statute, means to form a scheme, to lay a plan—to contrive. A scheme is a design or plan formed to accomplish some purpose. An artifice is an ingenious contrivance or device of some kind, and the term as used in the statute is equivalent to trick or fraud. To defraud implies or includes all acts, omissions, and concealments which involve a breach or legal or equitable duty, trust or confidence generally imposed, and are injurious to another, or by which an undue and unconscionable advantage is taken of another. It means to wrongfully deprive one of something he already has. Fraudulent pretenses, representations, or promises mean such fraudulent suggestions or representations of an existing or past fact or promise as to the future, by one who *known* it not to be true, as are adapted to induce the person to whom they are made to

part with something of value. It is necessary, therefore, that it should appear, to your satisfaction, from the testimony and beyond a reasonable doubt, that the conspiracy entered into by the defendants, if there was such a conspiracy, was to devise a scheme or artifice to defraud, or to obtain money or property by means of false and fraudulent pretenses or representations, to be effected by the postoffice establishment of the United States.

“The third essential element of the crime charged is that one or more of the conspirators should, after the conspiracy was formed and during its existence, do some act to effect the object thereof. And the act of one conspirator for this purpose is, in law, the act of all.

“With this general statement of the law, we come to a consideration of the specific charges against the defendants on trial, and upon which they are to be convicted or acquitted.

“The indictment, which forms the basis of the charge, after alleging the incorporation of the United States Cashier Company, with an authorized capital of \$1,200,000 divided into 120,000 shares, of the par value of \$10 each, and the official relation the several parties bore to such corporation, charges in brief that, on or about the first day of September, 1910, the exact date being to the grand jury unknown, the defendants on trial and the other parties jointly charged with them conspired and confederated together to devise and execute a scheme to defraud, to be effected by means of the postoffice establishment of the United States, to obtain

money and property, by means of false and fraudulent representations, pretenses and promises, from some 55 persons named in the indictment, and designated and referred to as "investors," and other persons to the grand jury unknown and the public generally, by inciting and inducing such persons to open correspondence with the defendants and the corporation, and to purchase from them and the corporation shares of stock in such corporation, paying over and delivering to the defendants in exchange therefor money and property; that such purchases were to be induced by means of false and fraudulent representations and statements by the defendants, in newspapers, pamphlets, catalogues, and letters, to be transmitted through the United States mails, and by words orally spoken, that the corporation owned patents to a certain change-computing machine, a bank cashier, a lightning change maker, a currency paying machine, and a new style adding machine; that the corporation was engaged in the business of manufacturing and selling such machines; that on account of its ownership of the patents and the manufacture of the machines, the shares of the capital stock of the corporation were of great value, and that large dividends would be paid thereon within six months from the date of the purchase of the stock; that the corporation had a large number of bona fide orders for the purchase of machines, on account of which it would make a large profit; that the financial condition of the corporation was excellent, its assets largely exceeding its liabilities; that a certain amount of the stock offered for sale by the defendants belonged to the company, and that the money derived therefrom would belong to the corporation and be used

by it to increase its assets, and particularly for increasing its manufacturing capacity; that by reason of the financial condition of the company, it was justified in increasing from time to time the selling price of its stock. It is further charged that it was a part of the conspiracy that the scheme to defraud should be carried out by the defendants, from time to time during its existence, fraudulently and designedly publishing and causing to be published false and untrue statements of the assets and liabilities of the company, and of its financial condition, in which it would be made to falsely appear that the assets were greatly in excess of their value and the liabilities less than the true amount thereof. It is further charged to have been a part of the conspiracy and scheme that the defendants should so manage and control the business of the corporation that more than 25 per cent of the money received from the sale of stock would be appropriated by them to their own use and benefit, and that, for the purpose of inducing persons to purchase stock, they would from time to time wrongfully and fraudulently increase the selling price thereof. It is then stated that these proposed representations, statements, pretenses, and promises, except the ownership of the patent for the bank cashier, were untrue, and known to be such to the defendants and each of them, and were to be made for the purpose of cheating and defrauding the investors out of their money and property, and that the defendants well knew such investors would lose all the money invested by them. It is further charged that it was the understanding and agreement that the conspiracy was to, and did in fact, continue from September 1, 1910, to January 1, 1915, and that

the defendants, and each of them, were parties thereto during that time.

“It is also alleged that, in pursuance of the conspiracy charged, and to effect the object thereof, the defendants Bonnewell, Menefee and LeMonn deposited and caused to be deposited in the United States mails, and for transmission thereby, certain letters and telegrams set out in the indictment, and which have been referred to throughout the trial as the overt acts.

“The defendants have each entered a plea of not guilty. This plea is a denial of every material allegation in the indictment, and imposes upon the Government the burden of proving each and all of these to your satisfaction, beyond a reasonable doubt, before you will be justified in returning a verdict in its favor.

“Now, the material allegations in brief are, first, that there was a conspiracy, agreement, or understanding upon the part of the defendants; second, that such conspiracy was to devise the particular scheme to defraud set out in the indictment; and, third, that it was a part of the understanding and agreement that the postoffice establishment of the United States was to be used for the purpose of executing the scheme. It is therefore incumbent on the Government to prove, not only that the defendants conspired together to devise the particular scheme set out in the indictment, but that it was a part of such agreement or conspiracy that the scheme should be executed by the use of the postoffice establishment of the United States; and if as to any one or more of the defendants the Government has

failed to prove any one or more of the elements necessary to constitute the crime charged, it is your duty to find such defendant or defendants not guilty.

“The jurisdiction of this court over this case is because of the charge that it was a part of the alleged conspiracy or agreement that the scheme, if there was a fraudulent scheme, should be executed by the use of the United States postoffice establishment. This court does not have jurisdiction to punish persons for entering into fraudulent schemes or devices, nor for committing frauds, unless it is a part of their agreement that the United States mails should be used in carrying them into effect. Therefore, even though you should find that the defendants did agree together to devise a scheme to defraud, it would not be sufficient to justify their conviction unless it also appears that it was a part of such conspiracy that the United States mails should be used for executing it. And even if injury resulted from the acts of one or more of the defendants, brought about and executed in whole or in part by the use of the mails, it would not justify a conviction of such defendant or defendants unless it further appeared that the original agreement or understanding contemplated the use of the mails in furtherance of their common purpose.

“The indictment charges that the alleged fraudulent scheme was to be carried out and executed by certain specific false representations. It is not incumbent upon the Government to prove that all of the means set out in the indictment were in fact agreed upon to carry out the alleged conspiracy, or that any of them were ac-

tually used or put into operation. It is sufficient if it be shown to your satisfaction, beyond a reasonable doubt, that the conspiracy was entered into for the purposes indicated, and that one or more of the means described in the indictment were to be used to execute it, and that, during the continuance of the conspiracy, the alleged overt acts, or some one or more of them, stated in the indictment were done by one or more of the conspirators to effect the object thereof.

“It is charged in the indictment that one of the means to be used by the alleged conspirators to carry out their fraudulent scheme was to represent that the United States Cashier Company owned patents to the certain coin machines heretofore mentioned, when in truth and in fact they did not own such patents. If it was a part of the conspiracy, if a conspiracy existed, that the defendants should represent that the corporation owned patents to the machines which they proposed to manufacture, and such representations were false and known to be so to the parties making them, and were made for the purpose of inducing and persuading persons to purchase stock, it would constitute a scheme to defraud within the statute. And you in this connection should consider any wilful misrepresentation that the defendants may have made in relation to the patent situation. But if at the time these representations were made the company did in fact have patents, issued by the Patent Office of the United States, for any of the machines, the representations, so far as that particular machine was concerned, would not be false. Bad faith or fraudulent misrepresentations cannot be imputed to the defendants

in respect of patents in fact issued, and owned by them, or in respect to claims that are in fact allowed, because of some alleged infringement. There is a presumption of law that, where a patent is issued by the United States Patent Office, it does not infringe any known patent, and a patentee in accepting such patent is not thereby guilty of bad faith. You are not called upon to decide in this case whether the patents issued or the claims allowed were in fact an infringement of some invention or patent, or were dominated or affected injuriously by the Osborne and Lindelof or the Cook patents, or any previous invention, and the evidence of the witness Sewall to that effect should be disregarded. The question on this branch of the case is, were the representations made by the defendants, if any, concerning the patent situation false and made in bad faith, with a fraudulent intent to deceive purchasers of stock in or of the company, or were they made in good faith, with an honest belief in their verity? A representation to be fraudulent must not only be false, but must have been made in bad faith and with a fraudulent intent to deceive, to the injury of the person to whom the representations were made. Honest mistakes or errors of judgment in regard to these matters, or any matters involved in this case, or statements inadvertently made, without a fraudulent purpose, even if material, are not fraudulent. As I understand the testimony, it is admitted that, at the time the advertisements were inserted in the newspapers, the company did not own patents to all the machines therein enumerated, and whether those representations that they did own patents to machines to which they had no patents, if such representations were

in fact made, were fraudulent and made for the purpose of deceiving purchasers of stock is a question for you to determine from the testimony in this case.

“It is also charged in the indictment that other proposed means of carrying out the fraudulent scheme were to falsely represent that the United States Cashier Company was engaged in the business of manufacturing and selling these coin machines; that the company had a large number of bona fide orders for the purchase of machines, and that the financial condition of the company was excellent, and such as to justify increasing from time to time the selling price of the stock, and that certain stock to be offered for sale belonged to the company, and the money derived therefrom would belong to the company, and be used by it, and become a part of its assets, and be used in its manufacturing business. If these representations, or any of them, were agreed to be made, and were false and known to be such to the defendants, and were to be made for the purpose of deceiving the public, they would constitute schemes to defraud within the meaning of this statute.

“Respecting the charge of the false representations regarding the enterprise of manufacturing and selling the machines mentioned in the indictment and the evidence, if the defendants honestly and in good faith intended to establish a business to manufacture and sell the machines, in the belief, as the situation then appeared to them, that it would be profitable to the company and its stockholders, you cannot find them guilty of the charge that the company was not intending to

engage in either the business of manufacturing or selling such machines.

“With reference to the evidence that the price of the stock was raised at intervals, if you find that it was done in the honest belief at the time that the progress of the affairs of the company justified such raise, and that the stock was of the value of the increased price, though such belief may not have been justified by the then condition of the enterprise as indicated by subsequent events, you cannot find the defendants guilty because they proved to be mistaken about that.

“The statute which it is charged the defendants conspired to violate includes everything designed to defraud by false and fraudulent representations as to the past or present, or suggestions and promises as to the future, and the significant fact in this case is the intent and purpose of the defendants in making the representations charged in the indictment, if they were in fact made. The question for your determination is not whether the business which the defendants were engaged in promoting was a legitimate business, or was practicable or not. If the corporation, and the defendants as officers and agents thereof, entered in good faith upon the business, believing that the representations made by them, or to be made, were true, and that they could and would earn enough to justify the promised returns on the investment, they should not be convicted, no matter how visionary you may consider their plans. Their good or bad faith in these matters is to be determined, and their several acts and declarations con-

strued and interpreted, by conditions as they existed at the time the statements and declaration were made, and as they appeared to the defendants at that time, and not by the final result of the enterprise, or from present conditions.

“To constitute a scheme to defraud, to be carried out by the use of the United States mails, it is not necessary that the scheme would be fraudulent on its face. Although apparently a legitimate business, it is within the statute if there was an intent not to conduct the business honestly, but to use it as a basis to defraud.

“The indictment, after setting out the conspiracy and the purpose thereof, and the means to be used to effect the same, alleges that, in furtherance thereof and for the purpose of effecting its object, certain letters were mailed by the defendants Bonnewell, LeMonn and Menefee, and sent through the United States mails to the parties named in the indictment, and these constitute what have been referred to throughout the trial as the overt acts, or the acts done by one or more of the conspirators to effect the object thereof. This is an essential allegation, and must be proven by the Government. A conspiracy alone does not constitute a crime, but one or more of the conspirators must, after its formation, do some act to effect the object thereof. It is not necessary for the Government to prove each of these acts. If you are satisfied, beyond a reasonable doubt, that one or more of the letters set out in the indictment were sent by one of the conspirators, if there was a conspiracy, after its formation and during its

existence, to effect the object thereof, that is all the law requires. And in determining whether the letters set out were sent by one of the conspirators to effect the object of the conspiracy, if one was formed, you should consider the character of the letters, the purpose to be accomplished thereby, and all the circumstances bearing upon that question, and from that determine what the object and purpose was in sending the letter or letters through the mails.

“The indictment also charges that it was the purpose or intent of the defendants to defraud the persons named in the indictment, and the public generally, out of their money. The law presumes that every person intends the natural and probable consequence of his own act, and if you believe from the evidence, and beyond a reasonable doubt, that the defendants, or any two of them, conspired to do the things named in the indictment, substantially in the manner and form as therein set out, and that it was the natural and probable consequence of their acts that purchasers of stock of the Cashier Company would be defrauded, then you would be justified in finding that it was the intent of such defendants so entering into the conspiracy, if there was a conspiracy, to defraud the persons named.

“In order for one person to defraud another, it is not necessary that he should bear any malice or ill will toward such person. If the defendants in this case agreed together that they were to sell the shares of stock in this corporation upon and on account of false and fraudulent representations, which they would make

knowing these representations would be false and untrue, and knowing that they would be made for the purpose of deceiving the investors and the public as to the true condition and value of the shares of stock, then the law would imply that they intended to defraud all of the persons who should buy shares of stock from them, or from the Cashier Company, relying upon such representations.

“It has been truly said in argument that one of the cardinal points in this case is the intent of the defendants. But what intent? Was it their intent that they could make the business of the United States Cashier Company a success? Was it their belief that they could make the enterprise of the United States Cashier Company successful? The answer to these questions would necessarily be No. If they agreed to make false and fraudulent pretenses, representations or promises; if they agreed to make false and fraudulent representations and assurances, for the purpose of deceiving the investors and the public in respect to the true condition of affairs of the corporation, or the value of its stock, then the ultimate intent to make the business of the corporation a success, or the ultimate belief of the defendants that they could finally make it a success, would by no means furnish any condonation or legal excuse for the false and fraudulent representations, which they would under the circumstances agree to make in order to induce the investors and the public to pay over their money.

“In considering this question, the question of and concerning the intent to defraud, you must direct your

attention to the intent presented by the particular transaction set out in the indictment. If these defendants agreed that they would put forth the false representations or promises alleged, for the purpose of deceiving and misleading investors and the public into paying over their money, then it matters not how confident they may have been that they would be able to make the business or the corporation a success, or how confident they may have been that they would be able to return that money without loss, or with profit, because the representations which they would have agreed to make would be made for the purpose of getting the money in a wrongful manner, and they could not, under such circumstances, make them rightful by pointing to some ultimate good intent.

“The parallel between such a case as I have presented and the crime of embezzlement is very close. It is a well-known fact that nearly every man who embezzles money expects that he will be able to pay it back without loss; but his taking is wrongful, and his intent to pay it back without loss cannot cancel the wrong. And so in this case, if the defendants, by means of the false and fraudulent representations set out in the indictment, agreed to mislead investors and the public generally into paying over to them or to the Cashier Company their money and their property, then their belief that they could ultimately return that money without loss and with profit would not condone the wrong in getting the money by deception.

“The law presumes that every man intends the logical and natural consequences of his own wrongful

act. Applying this rule to the case at bar, if you believe from the evidence, and beyond a reasonable doubt, that these defendants agreed among themselves that they would sell to the public and to these investors the shares of stock of the United States Cashier Company, under the false and fraudulent representations set out in the indictment, or some of them, then you would be justified in finding that the defendants agreed to defraud the investors and the public, notwithstanding the fact that you also might believe that the defendants really believed that the value of the stock would be ultimately such as to return to the investors a profit instead of a loss.

“It is not necessary in this case, in order to convict one or more of the defendants, that you should be satisfied that each of the defendants knew or understood all of the fraudulent representations, promises, or pretenses that were to be made, if any were to be made. If one of these defendants, at any time prior to the period of three years from the date of filing the indictment, and prior to the time when any overt act set out in the indictment was committed, agreed with another of said defendants that they would act jointly in carrying out the alleged fraudulent scheme set out in the indictment, and in selling the stock of the corporation representing that the money to be received from such sale was to go into the treasury of the company to be used by it in building factories, knowing that the shares of stock which were to be offered for sale were in truth and in fact the privately owned stock of another of the defendants, and that none of the money would go into

the treasury of the company, and you further believe from the evidence that some of the false and fraudulent pretenses and promises set out in the indictment were to be used by the defendants for the purpose of inducing the investors to purchase such shares of stock, then you would be justified in finding that such persons so agreeing to sell the stock in said manner and under such false representations were parties to the conspiracy.

“If you believe from the evidence that the original purpose of the defendants was legitimate, and you further believe from the evidence that they believed in the future of the United States Cashier Company and believed that it would ultimately pay dividends to the investors, and you believe from the evidence and beyond a reasonable doubt that they deliberately agreed together to take advantage of the public interest in a meritorious invention in order to sell to the public shares of stock by the false and fraudulent representations set out in the indictment, if they were false, then you would be justified in finding that the defendants intended to defraud the persons to whom they should sell such stock.

“In determining whether or not the defendants intended to defraud the investors of the money by selling to them the shares of stock of the corporation, you have a right to take into consideration the question of the commissions which the evidence shows, or tends to show, were received by the defendants, or any of them, from the proceeds of the sale of the stock.

“Now, the intent to form a scheme or artifice to defraud is an act of the mind which necessarily involves

an intention to defraud. The purpose to devise such a scheme and the evidence of such intent may be shown by the acts and declarations of the parties and by attending circumstances, as well as by direct evidence. Whether such an intent has been proved in this case is a question of fact for your determination. Experience shows that positive proof of fraudulent acts is not generally to be expected, and for that reason, among others, the law permits a resort to circumstances as a means of ascertaining the truth, and in such case great latitude is allowed by the law to the acceptance of indirect or circumstantial evidence, the aid of which is constantly required, not merely for the purpose of remedying the want of direct evidence, but also to supply protection against imposition. Whenever the necessity arises for a resort to circumstantial evidence, either from the nature of the inquiry or the failure of direct proof, great latitude is allowed in its admission, for the reason that the force and effect of circumstantial facts usually, and almost necessarily, depend upon their connection with each other. Circumstances altogether inconclusive if separately considered may, by their number and joint operation, established or corroborated by minor circumstances, be sufficient to constitute conclusive proof. And where fraud in the purchase or sale of property is in issue, evidence of frauds of like character, committed by the same parties at or near the same time, is admissible, on the ground that, where transactions of a similar character executed by the same parties are closely connected in point of time, the inference is reasonable that they proceed from the same motive.

“In order to constitute a scheme and artifice to defraud, it is not necessary to show that the defendants intended to defraud every person with whom they might have dealings, or that their entire business was a fraud. Neither is it necessary to show or prove that the scheme or artifice was developed all at one time.

“While circumstantial evidence is admissible and competent to establish a fraudulent intent, it is equally admissible and competent for the purpose of establishing good faith and honesty of purpose, or the non-existence of a fraudulent intent; and it is for you to say in this case, from all the facts and circumstances, whether the defendants entered into a conspiracy to devise a scheme and artifice for the purpose of defrauding those with whom they might deal, as charged in the indictment, or whether they acted in good faith. They are not on trial for evolving or devising an improvident or impracticable scheme, even though you should find their plan to be such. Nor are they on trial for mere errors of judgment. They are on trial for a criminal offense, and an essential element of that offense is an evil or criminal intent, which it is incumbent upon the Government to prove to your satisfaction, beyond a reasonable doubt. And where, as in this case, circumstantial evidence is relied on, the circumstances themselves must be proven, to the satisfaction of the jury and beyond all reasonable doubt, and when so proven, they must not only be consistent with the main fact in issue, namely, the guilt of the defendants, but they must be inconsistent with every other rational hypothesis. The question for your determination is whether the defendants were act-

ing in good faith in the sale and disposition of the stock of the corporation with which they were connected, or whether they were using such corporation and its business as a basis for a fraudulent scheme. It is sufficient, for the purpose of the present case, if a conspiracy is shown to use the mails in furtherance of a scheme or artifice to defraud, by means of the false and fraudulent representations set out in the indictment, by which the right of the purchasers of stock in the corporation to open and fair dealing was to be invaded, and that such fraud was to be accomplished by any of the means set out in the indictment, and that the letters sent by one or more of the conspirators and referred to in the indictment were written and mailed to effect the object of the conspiracy and in furtherance thereof. The formation of the corporation and the sale of stock therein is not itself criminal or wrongful, provided no deception or fraud is used to induce persons to make such purchases. The defendants, therefore, are not to be found guilty merely for selling or offering for sale stock in the corporation, although it may have proven an unprofitable investment to the purchaser, nor for mere mistakes or errors in judgment. And there is no presumption of fraud from the fact that glittering and glowing promises may have been made and not carried out, unless it shall appear that the persons who made such promises knew at the time of making same that they could and would not be carried out.

“The indictment charges that the conspiracy was formed in September, 1910. The date is not material. It is sufficient if it was formed sometime prior to the

overt acts charged in the indictment, and continued and was in existence at the time of such acts.

“Now, if you are not satisfied from the evidence, beyond a reasonable doubt, of the existence of the conspiracy as charged in the indictment, or if you have a reasonable doubt in that matter, you should return a verdict of not guilty as to all the defendants. If, however, on the other hand, you do believe beyond a reasonable doubt that the conspiracy was formed in manner and form as stated in the indictment, it will be necessary for you to determine who were the parties to such conspiracy. If there was a conspiracy as claimed by the Government, it would seem from the evidence that Menefee and LeMonn must be parties thereto. Menefee was the president and general manager of the company, and LeMonn was the sales manager, and together they had charge of the stock-selling campaign. Whether these two parties conspired and confederated together to defraud purchasers of stock in the manner and form as set out in the indictment is a question for you to determine from the testimony. And whether any of the other defendants were parties to the conspiracy, if you find one existed, is to be determined from the evidence offered against them. Before they, or any of them, can be convicted, it must appear that they were parties to the conspiracy set out in the indictment, and they cannot be convicted on evidence that they devised or were parties to some other conspiracy not charged.

“Gernert, Bonnewell and Todd were sales agents of the company, engaged in selling the corporate stock in pursuance of an agreement with the officers of the

corporation. Their connection with the alleged conspiracy cannot be established, as to any of them, by the acts and declarations or statements of the other defendants, made without their knowledge. One cannot be made a member of a conspiracy except by his own acts or declarations, and the acts and declarations of another are not evidence against him.

“Numerous letters have been offered and read in evidence, written or purporting to have been written or dictated by the defendants Menefee and LeMonn, and addressed to divers and sundry persons. These letters, if they contain statements tending to establish a conspiracy, are competent evidence to be considered by you as against the writer; but no statements made therein are to be taken as evidence against the other defendants not connected with such letters. The connection of the other defendants with the conspiracy must be determined from their own acts and conduct, and not from the declarations of the other alleged co-conspirators. Before either of the sales agents can be convicted, you must be satisfied, beyond a reasonable doubt, that the conspiracy existed as charged in the indictment, that they knew of its existence and purpose, and, with full knowledge thereof, joined therein with the purpose and intent of assisting in its accomplishment. Mere suspicion or conjecture that they were connected with an unlawful combination, if there was such a one, is not enough. All the facts necessary to make them conscious participants therein must be shown before you can find them guilty. If they acted in good faith, relying upon the representations and statements of their

superior officers, believing them to be true, they should not be convicted because they repeated such statements to intending purchasers.

“If, however, you find from the evidence that a conspiracy was entered into and existed as alleged in the indictment, and that, after its formation and while it was in existence, the defendants Gernert, Bonnewell and Todd, or either of them, became willing parties thereto and assisted in carrying it out, they would continue to be parties thereto and bound by every act in furtherance thereof until such time as they should by some act of their own, withdraw therefrom. To withdraw from a conspiracy after entering into it requires an affirmative action of withdrawing. If one willingly assists in starting evil forces into operation, he must affirmatively withdraw his support from them, or he must suffer the consequences of incurring guilt by those connected therewith; and until he does so withdraw there is conscious offending. These sales agents had a right to rely and act upon any statements made to them by their principal or employer, without inquiry as to whether they were true or false, if they honestly believed them to be true, unless, of course, it is apparent upon their face that they could not be true, and if an employer informs an employe that certain facts exist and are true, and that certain representations or promises may be made or carried out, the agent has a right to repeat these statements to such person or persons whom he has a right to interest in his project, without being criminally responsible for them, even though it afterwards transpires that they are not true. And it is not sufficient in this

case for the Government to show certain acts of these sales agents, or that these agents performed certain acts, and that one or more of the other defendants performed other and different acts, even though they had a similar purpose in view, unless it further appears that there was a common concert of action between them and an agreement so to act. These sales agents were not officers of the Cashier Company, and stood in no fiduciary relation toward its stockholders, or such persons as might become such stockholders. They were mere salesmen, and therefore had a right to make such a contract or agreement with the officers of the company concerning their own compensation as they were able to make, provided it was done in good faith, and with no intention to enter into any conspiracy that existed, if there was one.

“It is claimed as against both Gernert and Todd that they sold private stock, representing it to belong to the company and that the money derived therefrom would go into the treasury of the company, when in truth and in fact they appropriated the money to their own use, and the stock belonged to parties other than the corporation. Now, neither of these acts would constitute a crime within this indictment, unless you believe from the testimony, beyond a reasonable doubt, that these gentlemen knew of the alleged conspiracy, and that it was a part of such conspiracy that private stock should be sold as the stock of the corporation and upon a representation that the money derived therefrom should go into the treasury of the company.

“Again it is claimed, on behalf of Todd, that he severed his connection with this company some time early in 1912, and abandoned his previous relations with it, and therefore withdrew from the conspiracy, if there was a conspiracy at that time. Now, if that is true, or if you have a reasonable doubt upon that subject, then the fact that he subsequently, some year or two later, sold on his own account stock which he had purchased from one of the officers of the company, representing that it was company stock or that the money derived therefrom would go into the coffers of the company, would not justify a verdict of guilty as against him under the indictment now under consideration. And this same statement would apply to the defendant Bonnell. Before either of these, or any of these defendants can be convicted, it must appear that they were parties to the conspiracy charged in the indictment, and that their acts were done in pursuance thereof and in furtherance of such conspiracy.

“Now, gentlemen, this is a criminal case. The defendants have each entered a plea of not guilty, and, as I have said to you, that imposes upon the Government the duty of proving every material allegation necessary to constitute the crime, to your satisfaction beyond a reasonable doubt, before you can convict.

“When I have said heretofore in these instructions that a certain fact must be established by the Government, or a certain fact must be proven before you are justified in finding a verdict of guilty, I have meant always that it must be proven to your satisfaction beyond a reasonable doubt.

“The defendants, and each of them, are presumed to be innocent of this charge. This presumption is not a mere fiction which can be disregarded at pleasure. It is a substantial part of the criminal law of the country, and continues and abides with the defendants throughout the trial until overcome by the testimony. They are not required by law to prove their innocence. The burden is upon the Government to prove their guilt, and that beyond a reasonable doubt.

“By a reasonable doubt I do not mean a mere possible doubt, a mere captious doubt, but such a doubt as would cause a reasonable prudent man to hesitate to act in his own most grave and important affairs. It is not such a doubt as a juror might conjure up in his own mind, without any substantial basis for it, but it is a doubt founded either on the evidence or want of evidence, and is that state of the case which leaves your minds in such a condition that, after a careful consideration of all the testimony, you cannot say you feel an abiding conviction, to a moral certainty, of the guilt of the defendants. If you do so hesitate, you should give the defendants the benefit of it, and an acquittal. If, on the other hand, however, after an entire comparison and consideration of all the evidence, you feel an abiding conviction, to a moral certainty, of the guilt of the defendants, or any of them, under the law as I have given it to you, you should so declare in your verdict.

“You are the exclusive judges, gentlemen, of the credibility of the witnesses and the weight to be given to their testimony. You are also the exclusive judges

of all questions of fact, and if at any time during the trial the court has intimated its views concerning any disputed question of fact, or the testimony of any witness, you are to disregard it unless it conforms to your own understanding.

“Every witness is presumed to speak the truth. This presumption may be overcome by the manner in which a witness testifies, by his appearance on the witness-stand, or by contradictory testimony.

“The defendant Menefee has availed himself of the right given him, and testified in his own behalf. His testimony is before you, and you are to determine how far it is credible, and to apply to it the same rule and test that you apply to the testimony of any other witness who has been called in this case, keeping in mind, however, the deep interest which he has in the result of the trial.

“The other defendants have not testified, and no inference or presumption is to be drawn against them on that account.

“Now, there has been considerable said during this trial about the sale or transfer of the property, or part of the property, of the United States Cashier Company to an Indiana corporation. The defendants are not on trial for that transaction, and whatever you may think about it, you would not be justified in convicting them in this case on its account. The proof in reference to it was a circumstance in the case, developed during the trial, and it is proper for you to consider for whatever

you may think it is entitled to as explaining or supporting the charges made in the indictment.

“During the trial a witness by the name of Baker was called and testified. During his examination certain letters were produced, written to him by one of the officers of the corporation, not involved in this controversy however, and I desire to caution you again about giving any weight as evidence to any statements contained in those letters. They were used solely and entirely for the purpose of impeaching, or tending to impeach, Mr. Baker by showing that he had made statements out of court inconsistent with his testimony given on the trial. For that purpose they were used, and for no other, and any statements or declarations that Mr. Baker may have made in these letters concerning any of the defendants on trial, or any of the issues involved in this case, or any matters you are to consider, should be entirely disregarded by you, because the guilt or innocence of one individual cannot and ought not to be determined by the declarations of some third party.

“The indictment in this case charges but one conspiracy, although there are numerous overt acts alleged, and therefore the requirements of the law will be satisfied by a general verdict, without passing upon each of the particular overt acts. I think there is no controversy but what they were all proven except two or three; but in any event, proof of one or more of the overt acts, done by a conspirator, would be sufficient to support that averment in the indictment.

“Your verdict, gentlemen, must be unanimous, and after you retire to the jury room you will select one of

your number as foreman, who will sign any verdict that you may return.

“During the progress of this trial the court overruled or denied a motion for a directed verdict as to three of these defendants—Gernert, Bonnewell and Todd. You are not to infer from that, gentlemen, that in the opinion of the court there was evidence sufficient to convict these three gentlemen. It is the duty of the court to determine questions of law and of the jury to pass upon all questions of fact, and therefore, when the court denied the motion for a directed verdict, it simply held that, in its opinion, there was some evidence, sufficient to carry this case to the jury, and to call upon the jury to determine whether it was enough to show that these defendants were guilty of the crime charged against them, and you are to draw no inference against the defendants because of the action of the court in overruling such motion.

“Now, gentlemen, it is needless for me to remind you that this is a case of importance, both to the Government and to the defendants. Take it—consider all the facts and circumstances in evidence before you—consider it carefully and dispassionately, with an eye single to reaching a just conclusion, and return a verdict according to the law and the facts as you understand them.

“There are three forms of verdict that you can return in this case: One is a verdict of not guilty as to all the defendants. Another is a verdict of guilty as to all the defendants except the defendant Bilyeu, and as to him your verdict shall be not guilty. And the third is a ver-

dict of guilty as against two or more of the defendants, and not guilty as to the others. Forms have been prepared which you may adopt, or use these or similar forms, filling in the necessary blanks.

“Mr. Pipes: There are a few verbal matters I would like to call your Honor’s attention to. In the instructions concerning a conspiracy, that it may be a conspiracy to do a criminal act, or an innocent act by unlawful means. I take it that in this case it must be the first.

“Court: Yes, in this case it must be the conspiracy to commit the particular crime charged in this indictment.

“Mr. Pipes: Yes. Now, in one of the definitions of a conspiracy, your Honor, as I remember it and heard it, in naming a number of means or number of acts committed by several persons independently tending to the same end, that it constitutes a conspiracy. I think that would be correct if it were modified to say that it is evidence.

“Court: I didn’t intend to say constituted, if I said it. I intended, of course, to say that it was evidence of the conspiracy.

“Mr. Pipes: That, of course, then will be corrected, as far as that is concerned?

“Court: Yes.

“Mr. Pipes: Now, as to another one: In commenting on the subject of overt acts, your Honor evidently, it is perfectly plain to me, was speaking of the overt acts, but the word ‘overt’ was left out. I think the jury

ought to understand that no act in evidence in this case is an overt act except one of those described and set out in the indictment.

“Court: Yes, I will make that clear to the jury, if I didn’t do that. Gentlemen, the indictment in this case charges that certain letters set out and described in the indictment were sent by the parties named, through the United States mails, in furtherance or in execution of the alleged conspiracy; and these letters constitute the overt acts, and no other act could constitute an overt act except those stated in the indictment.

“Mr. Pipes: Now, I cannot, of course, set out—there was quite a long instruction your Honor gave, but I think I can identify it sufficiently for the purpose of the exception, where the question was asked and answered ‘No.’ I except to that. Does that sufficiently identify it? That whole paragraph.

“Court: Yes.

“Mr. Pipes: And the succeeding paragraph to that, and wherever that same doctrine was put forth, I would like to have an exception.

“Court: Very well.

“Mr. Pipes: Now, then, there is only one other, your Honor, that I want to call your Honor’s attention to: Beginning with the words ‘It would seem,’ followed by Mr. Menefee’s and Mr. LeMonn’s names—I would like an exception to that.

“Court: Very well.

“Mr. Reames: If your Honor please, during the trial and during the argument, both sides used figures given by Mr. House in evidence, and the understanding

was, between Judge Pipes and myself during the argument, that these should go to the jury. They were not introduced in evidence. I believe that they would be of material benefit to the jury in arriving at their verdict. Is there any objection to that?

“Mr. McGuire: There will be no objection on the part of the defendant Gernert, and that will be true as to all the figures of the witness House relating to Mr. Gernert’s case.

“Mr. Reames: Those are not made up in that way. This is showing the receipts and disbursements of the United States Cashier Company; but if you wanted Gernert’s made up, we could make it up and submit it.

“Mr. McGuire: I would be very glad to have that done.

“Mr. Reames: All right, if there would be no objection; and we will let you see it before it goes in.

“Mr. McGuire: That will be very good. If the Court please, I would like to take an exception to those instructions requested by the United States Attorney which were given, modified and not modified, and such instructions as were requested by the defendant Gernert as were not given. I think your Honor gave all of them, but I am not quite sure, and I just want to be sure.

“Mr. Dobson: I except to the instruction in which the Court stated that if there was a conspiracy Mr. LeMonn and Mr. Menefee were parties to this conspiracy, and for this special reason, I want to show in the record, your Honor, that the Court, in mentioning Mr. Bonnewell and other salesmen’s names, referred to the fact that they did not stand in a fiduciary relation to the

company, leaving the inference that Mr. LeMonn did. The record shows that Mr. LeMonn was not a fiduciary in connection with the company, either directly or indirectly.

“Court: Very well. Swear an officer. The jury may now retire.”

These instructions are set out in the Bill of Exceptions for the purpose of determining whether or not the errors hereinbefore recited, if errors, have been cured by the instructions.

To the giving of the following instruction the defendant, by his counsel, then and there duly excepted, and the Court allowed the exception, to wit:

“It has been truly said in argument that one of the cardinal points in this case is the intent of the defendants. But what intent? Was it their intent that they could make the business of the United States Cashier Company a success? Was it their belief that they could make the enterprise of the United States Cashier Company successful? The answer to these questions would necessarily be No. If they agreed to make false and fraudulent pretenses, representations or promises; if they agreed to make false and fraudulent representations and assurances, for the purpose of deceiving the investors and the public in respect to the true condition of affairs of the corporation, or the value of its stock, then the ultimate intent to make the business of the corporation a success, or the ultimate belief of the defendants that they could finally make it a success, would by no means furnish any condonation or legal excuse for

the false and fraudulent representations, which they would under the circumstances agree to make in order to induce the investors and the public to pay over their money.”

To the giving of the following instruction the defendant, (R) by his counsel, then and there duly accepted, and the Court allowed the exception, to wit:

“In considering this question, the question of and concerning the intent to defraud, you must direct your attention to the intent presented by the particular transaction set out in the indictment. If these defendants agreed that they would put forth the false representations or promises alleged, for the purpose of deceiving and misleading investors and the public into paying over their money, then it matters not how confident they may have been that they would be able to make the business or the corporation a success, or how confident they may have been that they would be able to return that money without loss, or with profit, because the representations which they would have agreed to make would be made for the purpose of getting the money in a wrongful manner, and they could not, under such circumstances, make them rightful by pointing to some ultimate good intent.”

To the giving of the following instruction the defendant, (S) by his counsel, then and there duly accepted, and the Court allowed the exception, to wit:

“The parallel between such a case as I have presented and the crime of embezzlement is very close. It is a well-known fact that nearly every man who embezzles money expects that he will be able to pay it back

without loss; but his taking is wrongful, and his intent to pay it back without loss cannot conceal the wrong. And so in this case, if the defendants, by means of the false and fraudulent representations set out in the indictment, agreed to mislead investors and the public generally into paying over to them or to the Cashier Company their money and their property, then their belief that they could ultimately return that money without loss and with profit would not condone the wrong in getting the money by deception.”

At the beginning of the trial it was agreed and understood between the Court and counsel that objections made and exceptions reserved by Martin L. Pipes, attorney for Mr. Menefee, should be deemed and taken to be objections and exceptions on behalf of all of these defendants.

It is Ordered that all of the exhibits mentioned in the attached stipulation be by the Clerk of this Court transmitted and forwarded in the original to the Clerk of the Circuit Court of Appeals at San Francisco, to have the same force and effect as though certified copies thereof had been printed and attached hereto and said exhibits, and each, every and all thereof are hereby made a part of this Bill of Exceptions.

*In the District Court of the United States for the
District of Oregon.*

UNITED STATES OF AMERICA,

vs.

Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E.

Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine, and Oscar A. Campbell,

Defendants.

STIPULATION.

IT IS HEREBY STIPULATED by and between the defendants Frank Menefee, Oscar A. Campbell, H. M. Todd, B. F. Bonnewell, and the United States Attorney for the District of Oregon, that the Judge of the above entitled court may settle and sign as allowed the attached and foregoing bill of exceptions; that the clerk of this court shall at the time the transcript is prepared for filing with the Circuit Court of Appeals, transmit to the said clerk, in the original:

Government's Exhibits 1 to 16, inclusive;
Government's Exhibit 22;
Government's Exhibits 28 to 30, inclusive;
Government's Exhibits 34 and 35;
Government's Exhibits 45 and 46;
Government's Exhibit 53;
Government's Exhibits 55 to 57, inclusive;
Government's Exhibits 59 to 70, inclusive;
Government's Exhibits 74 to 85, inclusive;
Government's Exhibits 92 to 108, inclusive;
Government's Exhibits 110 to 220, inclusive;
Government's Exhibits 222 to 442, inclusive.

That these original exhibits, and each, every and all thereof shall be deemed and taken as a part of this bill of exceptions to have the same effect as if they, each,

every and all thereof were copies in full in this bill of exceptions. Exhibit 306 need not be printed.

This stipulation is entered into for the purpose of saving the expense of copying all of said exhibits, and the court may make an order in accordance herewith.

Dated at Portland, Oregon, this 31st day of January, 1916.

CLARENCE L. REAMES,

United States Attorney.

MARTIN L. PIPES,

Attorney for the Defendant Frank Menefee.

JOHN F. LOGAN,

J. J. FITZGERALD,

MARTIN L. PIPES,

Attorneys for the Defendant Oscar A. Campbell,

H. M. Todd and B. F. Bonnewell.

The foregoing bill of exceptions contains all the evidence offered and admitted, relevant to or necessary to an understanding of the above recited objections and exceptions, and all the instructions given to the jury by the Court.

The foregoing bill of exceptions was duly presented and filed within the time fixed by the order of the Court, on behalf of the defendants Frank Menefee, B. F. Bonnewell, H. M. Todd and Oscar A. Campbell, and is by me duly allowed, this 4th day of February, 1916.

R. S. BEAN,

Judge.

Filed February 11, 1916.

G. H. MARSH,

Clerk.

And afterwards, to wit, on the 11th day of February, 1916, there was duly filed in said Court and cause a Petition for Writ of Error, in words and figures as follows, to wit:

PETITION FOR WRIT OF ERROR.

*In the District Court of the United States for the
District of Oregon.*

United States of America,

vs.

Frank Menefee, B. F. Bonnewell, H. M. Todd
and Oscar A. Campbell,

Defendants.

PETITION FOR WRIT OF ERROR.

Your petitioners, Frank Menefee, B. F. Bonnewell, H. M. Todd and Oscar A. Campbell, four of the defendants in the above entitled cause, bring this their petition for a writ of error to the District Court of the United States for the District of Oregon, and thereupon your petitioners show:

That on the 25th day of October, 1915, there was rendered and entered a judgment wherein and whereby your petitioner Frank Menefee was sentenced to imprisonment at McNeil's Island for a period of one year and ten days; and your petitioner B. F. Bonnewell was sentenced to imprisonment in the County Jail of Multnomah County for a period of four months; and your petitioner H. M. Todd was sentenced to imprisonment

in the County Jail of Multnomah County for a period of four months, and your petitioner Oscar A. Campbell was sentenced to imprisonment in the County Jail of Multnomah County for a period of four months.

And your petitioners show that they are advised by counsel that there were manifest errors in the records and proceedings had in said cause in the rendition of said judgments and sentences, to the great damage of your petitioners, the defendants, all of which errors will be made to appear by an examination of the said record, and more particularly by an examination of the Bill of Exceptions by your petitioners tendered and filed herein, and in the assignment of errors thereon hereinafter set out.

And to the end, therefore, that the said judgments, sentences and proceedings may be reversed by the United States Circuit Court of Appeals for the Ninth Circuit, your petitioners pray that a writ of error may issue, directed therefrom to the said District Court of the United States for the District of Oregon, returnable according to law and the practice of this Court, and that there may be directed to be returned, pursuant thereto, a true copy of the record, bill of exceptions, assignment of errors, and all proceedings had in said case, that the same may be removed into the United States Circuit Court of Appeals for the Ninth Circuit, to the end that the error, if any has happened, may be fully corrected, and full and speedy justice done your petitioners.

And your petitioners now make the assignments of error attached hereto, upon which they will rely, and

which will be made to appear by the return of the said record in obedience to said writ.

WHEREFORE, your petitioners pray the issuance of a writ as hereinbefore prayed for, and pray that their assignments of error annexed hereto may be considered as their assignments of error upon the writ, and that the judgments rendered in this case may be reversed and held for naught, and said case remanded for further proceedings.

MARTIN L. PIPES,
J. J. FITZGERALD,
JOHN F. LOGAN,
Attorneys for said Defendants.

Filed, February 11, 1916, G. H. Marsh, Clerk.

And afterwards, to wit, on the 11th day of February, 1916, there was duly filed in said Court and cause, an Assignment of Errors, in words and figures as follows, it wit:

In the District Court of the United States for the District of Oregon.

United States of America,

vs.

Frank Menefee, B. F. Bonnewell, H. M. Todd
and Oscar A. Campbell,

Defendants.

ASSIGNMENTS OF ERROR.

ASSIGNMENTS OF ERROR OF DEFENDANTS FRANK MENEFEE, B. F. BONNE-

WELL, H. M. TODD, AND OSCAR A.
CAMPBELL.

The defendants Frank Menefee, B. F. Bonnewell, H. M. Todd and Oscar A. Campbell, in this motion, in connection with their petition for a writ of error, make the following assignments of error, which they aver occurred upon the trial of the cause, to wit:

I.

The Court erred in admitting testimony, over the objection of the defendants, contained in objection and exception "A," in the bill of exceptions, which is the testimony of N. C. Oviatt, who testified that his name was Nelson C. Oviatt; that he lived at Detroit, Michigan, and was engaged in the manufacture of coin-paying machines, called the Payograph, was president of the Payograph Company, which was a corporation organized under the laws of Michigan, incorporated for \$300,000, with a principal office in Detroit, and having machines manufactured for it in New Haven, Connecticut; that he was acquainted with the defendant Thomas Bilyeu, and met him first in the summer of 1909 in the Ainsworth Block, Portland, Oregon; that the witness had been in Portland since 1892, first in the manufacture of silver spoons, later as an employee of the County of Multnomah, in the tax collection department, and later as coast agent for the Comptograph Company of Chicago, in the sale of adding machines, and also represented the Brandt Cashier Company in the sale of Brandt Automatic Cashiers; that he devised the principle of a coin-paying machine and had gone to Mr. Glover, a pub-

lic engineer, with a view of having him develop it for the witness, but he was unable to do so, and that he presented it to Mr. Bilyeu; that Mr. Bilyeu took it under consideration, and after two days of deliberation said he would take it on, with the understanding that he would have forty per cent. of the results and that the witness was to have the other sixty per cent of the results; that the agreement was not in writing; that the witness was to turn over to Bilyeu his ideas and Bilyeu was to proceed with the development and put it into working shape and build a model.

Which evidence was stated at the time by the District Attorney, in response to an objection made by the defendant's counsel, to be for the purpose of showing that back in 1909 the witness, Mr. Oviatt, was working on a coin-paying machine, and that he had made a full and complete disclosure to the defendant, Bilyeu, and that the Government was going then to proceed to follow the making of the machine known as the Payograph, and the knowledge of the Payograph as it was brought home to the defendants, the attempted sale of a similar machine by the defendants in England, and their knowledge of the Payograph applications pending there, and conversations had between defendants Bilyeu and Menefee and LeMonn with this witness; bring these transactions down to the date where LeMonn made an investigation of the Payograph machines personally and sent the telegram that had been introduced in evidence. And, in response to an inquiry by defendant's counsel, the District Attorney said that the evidence would go to the

extent of showing the knowledge of the defendants of the work that Mr. Oviatt was doing.

This evidence was admitted over the said objection upon the question of the good faith of the defendants.

II.

The Court erred in admitting the following testimony:

The witness continued, under the said ruling of the Court, for the purpose as aforesaid, and testified that he disclosed to Mr. Bilyeu the basic principle, which was the connection of each individual key with a selector bar or rod so that by a depression of that key the proper ejector or ejectors would be turned from a non-paying to a paying position; that Mr. Bilyeu said he would undertake the work, with the understanding that the results would be divided, sixty per cent. to the witness and forty per cent. to Bilyeu, and that was agreeable to witness, and that they shook hands on it. That Mr. Bilyeu said to him, "I will take you out to my model maker," which he did, in South Portland, to Mr. Overlin; that he had not seen Mr. Overlin before, and that Mr. Bilyeu introduced him to Mr. Overlin, and said that the witness had been associated with Mr. Potter in the development of the machine and had not been treated fairly by Mr. Potter, that witness had devised a machine of his own and arranged with Bilyeu to develop it and wanted Overlin to undertake the manufacture of the model; that Mr. Overlin accepted, and they returned to town; that Mr. Bilyeu advertised for a draftsman and put him

to work in the Ainsworth Block; that a model was constructed; that a month or six weeks after that time Mr. Bilyeu said to the witness one day that he had been thinking the matter over for a week past, and had decided that the witness did not own anything in the device, and went on to say that he had applied for a patent in his own name, and the witness said there was nothing further to do except for witness to make a better machine, and that Mr. Bilyeu said he could not do it. That he went East the 2nd day of May, 1910, and went first to the Comptograph Company with sketches, and then to the Wales people, and finally arranged for the building of the machine, and completed it in August, 1910, and that was the Payograph machine; that he applied for a patent on the machine in August, 1911; that the first model was made in August, 1910, and that the second model was completed in 1912.

The witness was then shown three photographs, which were identified as photographs taken in August, 1910, of a machine he had just completed and demonstrated to the executive board of the Wales Adding Machine Company, and the Government then offered the said three photographs in evidence, which were admitted over the defendants' objection and exception, which is exception "B" of the bill of exceptions.

III.

The Court erred in admitting the following testimony:

The witness then continued, subject to the same ruling of the Court, to testify that he returned to Portland the latter part of August, 1910; that he knew of a certain machine of the United States Cashier Company, known as the Bank Cashier, had heard of it and seen it, but never examined it closely; that he thought the machine was one that was covered by the application over the names of Bullington, White and Overlin; that in the year 1910 he met Mr. Bullington, and that he exhibited the three photographs in evidence to Mr. Bullington in August, 1910; that he met the defendant F. M. LeMonn in the office of the Payograph Company in Detroit in January, 1912, and that LeMonn told him that he had been at the office of the National Cash Register Company and had there been told of the Payograph; that LeMonn had a little booklet descriptive of the Payograph, which he said had been given to him by the paymaster. Witness identified a book which he said was exactly like the one LeMonn showed him; that it was issued by the Payograph Company, and that it was the one LeMonn brought to him at the time, one exactly like it and of the same issue, and that LeMonn said he had received it from the National Cash Register Company. The said booklet, over defendants' objection, was admitted in evidence, which is exception "C," and which book is as follows:

The witness continued and testified that the defendant LeMonn said that he had been told of the Payograph by the paymaster, Mr. Myer, and wished to see it, and after questioning by the witness said that he had been with the United States Cashier Company but was not

with them at the time, had got through selling stock and was East looking for other things to finance, and asked the witness if he did not want to take hold of the Payograph and finance it, which the witness said he did not. The witness said he demonstrated the Payograph to LeMonn; that Mr. LeMonn expressed himself as pleased with it, went on East and left his address, with the request that the witness think over the matter of financing the proposition and communicate with him if they decided to take him on to do the work; that the machine he demonstrated to LeMonn was the one described in the little booklet; that there was no model of it. The witness further said he took half an hour to demonstrate the machine; that the machine would pay money, list it and add it; that he did not take the case off the machine, the mechanical part of it.

The witness, further testifying, said that he met Mr. Menefee in October, 1913; that Mr. Menefee came to his office in October, 1913, and told him that he was the president of the United States Cashier Company, and asked what they were going to do with the British patents, or if the witness had sold them, and he said he had not; that Menefee asked what they were going to do with them, and he said he had no other plans than to retain them; that Mr. Menefee then told him they were arranging for a syndicate in Britain to take over their British rights, and that he felt upon investigation by the people there they might run upon the application and it might possibly interfere with the deal, and that he thought for the good of both it might be well to make some arrangement whereby the patent of the Cashier

Company in Great Britain would be included with the patent of the Oviatt machine; that Menefee described to him the deal, that it was to be a million dollar corporation, of which \$200,000 stock was to be paid to the United States Cashier Company, and \$50,000 in cash, which was to be divided between Mr. Bilyeu and the United States Cashier Company, and that if the witness would come into the deal it would be split in thirds. That Menefee wanted him to combine their entire interests in one large corporation. The witness said he took the matter under consideration, and afterwards, in about two weeks, told Menefee he would not entertain the deal.

The witness further testified that subsequent to this conversation, and at the request of defendants Bilyeu and Menefee, he had met said defendants in Chicago, and that they had attempted to get the witness to go in with them upon a proposition by the terms of which the Payograph was to be included in the deal that the defendants had pending in England, and the two said defendants represented to witness that on account of the conflict in Great Britain between the machine of the United States Cashier Company the deal could not be closed without the co-operation of the witness. The witness further testified that he refused to consider said proposition. The witness further testified that the Payograph machine had been patented in the London patent office, and that the Payograph Company owned it.

Witness was asked to demonstrate the Payograph machine, a model of which was in the court room, which he did, and said that the adding machine was not his invention, but that the coin-paying device was his inven-

tion, and was connected with the adding machine so that when the key was depressed and the handle of the adding machine operated, the money is ejected into the hand or an envelope, and fully explained the working of his machine. He testified that his machine was so constructed that the adding machine could be used with or without the coin-paying mechanism, that they were detachable.

And thereafter, and in the course of the trial, Mr. Dobson, of counsel for Mr. LeMonn, asked the District Attorney to have the Oviatt machine brought back into court, after Mr. Oviatt had been excused, and the next morning, at the opening of the court, Mr. Reames offered the said machine, stating that he did not claim the right to have it demonstrated, that the machine was to be shipped East, but that it was at the disposal of the defendants. Whereupon the counsel for these defendants stated to the Court that they did not desire to have the machines demonstrated and that the machine could be sent East as far as they were concerned, but one of the jurors requested that the machine be demonstrated, and thereupon the witness proceeded to demonstrate the machine by actually operating it by putting money into it and by manipulating it, having the money paid out in envelopes according to the design and purpose, the said demonstration being made in the presence of the jury.

IV.

The court erred in admitting the testimony of E. D. Sewell, over the objection of the defendants, which is Exception "D."

Mr. Sewell had testified that he lived in Washington, D. C., and had been employed in the United States Patent Office, for nine years in the Examining Corps, nine years and a half as Assistant Examiner, and about the same period as Principal Examiner, and for the remainder as an Examiner of Classification, and had detailed at length his duties, tending to show his qualifications as an expert in relation to patents, and the procedure in the Patent Office. He further testified that he had made an examination of the records of the Patent Office to ascertain the patents and applications owned and standing in the name of, upon the records of the United States Patent Office, the United States Cashier Company; that his examination extended from January 1, 1909, to December 31, 1914, and he testified that the United States Cashier Company did not own a patent to an adding machine, nor did it, at the time of the examination of the witness, and did not have an application on file for an adding machine on October 29, 1911; nor did it have an application on file at that date for the Lightning Change Maker described; that a patent for the Lightning Change Maker was issued July 6, 1915, and the number of the patent was 1,145,700. That there was no application for the Change Computing Machine by the United States Cashier Company on October 29, 1911, and that the United States Cashier Company did not own any patent for any machine designed to do that work; that the United States Cashier Company did not own any patents to any machine which was designed to compute change for department stores and all classes of retail business, as described in the advertisement; that on the 29th day of October, 1911, the United States

Cashier Company had no application on file for any machine that would do that work, and that from the 1st day of January, 1909, until the 31st day of December, 1914, the United States Cashier Company never did own patents to any of the machines described in the advertisement about which he had been asked.

And the witness testified that the patent which was issued on the 6th day of July, 1915, about which he had testified, was assigned to the International Money Machine Company, and witness presumed it was issued to them; that it had been assigned by the United States Cashier Company; that the patent was based on application made by W. S. Overlin; that except for the assignment it would have been issued to the Cashier Company, and the District Attorney admitted that it was by virtue of the assignment of the United States Cashier Company that the International Company got the patent.

The witness had stated a list of all the applications that had been filed, either on behalf of the United States Cashier Company, or assigned to the United States Cashier Company, and all patents that had been either issued to the United States Cashier Company, or issued to anyone else and assigned to the United States Cashier Company, from the year 1908 to December 31, 1914. These patents were as follows: The first patent was the Potter patent, issued April 28, 1908, and assigned by mesne assignments to the United States Cashier Company, recorded April 12, 1912. A certified copy of the letters patent was received in evidence, Exhibit 343. The witness then described the objects of the invention.

The next patent was issued to Thomas Bilyeu, December 31, 1912, and was a design for the casing for coin-handling machines. And witness testified that there were other applications and other patents that were issued to others, like Thomas Bilyeu, and assigned direct to the International Money Machine Company; that there were eighteen applications and patents together that were either issued to Mr. Bilyeu or to Mr. Overlin and assigned, or other persons in the United States Cashier Company, and assigned to the International Company; that of these eighteen applications there had been six patents issued and the other twelve applications were pending; that there were four where title never went through the United States Cashier Company, but assignment was made to the International Money Machine Company. One of these patents was dated October 20, 1914; another was issued February 28, 1911, assigned by Overlin to Bilyeu, and by Bilyeu to the International Company; another was application by Thomas Bilyeu, filed April 14, 1910, assigned to the International Money Machine Company; another was application filed March 27, 1911, by Bilyeu and Overlin, assigned by Overlin to Bilyeu, and by Bilyeu to the International Company, and the latter had been allowed by the Examiner but not yet patented. Another was application filed September 24, 1909, which was forfeited, and was afterwards passed to issue and patented September 14, 1914, to Thomas Bilyeu.

The witness was then asked the following question: "Now, you have said in your examination yesterday that when an application is filed in the Patent Office, and the

Examiner has made his search and finds something in conflict, or apparently in conflict, that those claims are cited and notice given to the applicant that certain claims are cited against him. Now, can you give to the jury the number of the prior patents that were cited against this Bilyeu Cashier?

The witness answered: "Yes, I have a note of that. Fifteen patents cited during the prosecution of this application."

And the witness testified that one of the citation was a patent issued to a man by the name of Lindeloff, Patent No. 619,321, dated February 14, 1899.

Whereupon the District Attorney asked the witness the following question: "Are you able to say from that examination, as an expert in the science of patent law, whether or not the Lindeloff patent dominates the Bilyeu Cashier?"

To which question the defendants' counsel objected, on the following grounds: "We object to going into it to show whether or not some prior patent they did cite, upon which the Department has issued a patent, if anything conflicts with that. If it were so, it wouldn't have anything to do with this case, and then the court and this jury can't try that out here, it seems to me. This is something that took place in the Patent Office. These defendants made their application."

The counsel for the defendants asked the witness this question: "The Department cites this previous machine, doesn't it?" And the witness answered: "Yes."

After argument of counsel, the Court ruled upon the objection as follows: "The controlling question in this case is one of good faith, and the Government charges that these people were not engaged in a legitimate enterprise, but were using it for the purpose of defrauding the public. Now then, if they had these patents, or pretended to have them, knowing at the time that they were not what they were representing them to be, and based upon that, insisted and represented that their stock was of a certain value, and was increasing in value all the time, and that they proposed to go ahead and manufacture these machines, it would come within the terms of this indictment, and would be a question that I think the jury have a right to consider, in determining whether they were acting in good faith in this transaction. If they were, then of course that is the end of the case. If not, and they come within the provisions of the indictment, and sustained by the testimony, they would be guilty of the charge against them. Therefore, I think the Government has the right to show that, notwithstanding these people had patents, if they knew at the time that their patents were invalid, and would not permit them to manufacture these machines, it is a circumstance going to determine whether they were acting in good faith, or not. It does not go to the validity of the patents. We are not trying that question. It goes to the good faith of the defendants, and for that reason I think the testimony is competent."

And so the Court overruled the objection and permitted the witness to answer, in which ruling the Court erred.

V.

The Court erred in admitting the following testimony:

Under the said ruling of the Court the witness testified that the Lindeloff patent was issued February 14, 1899, which was cited against the Bilyeu patent, and the witness said he had read the claim of the Lindeloff patent in connection with the machine shown and described in the Bilyeu patent, No. 1,114,574, and in his judgment the construction shown and described was within Claims 1 and 2 of the Lindeloff patent.

And the District Attorney asked the following question: "What would you say as a patent expert as to whether or not the claims numbered 1 and 2 of the Lindeloff as allowed, dominate and control these claims in the Bilyeu Cashier?"

And the witness answered: "These claims as allowed dominate the construction shown in the Bilyeu Cashier."

And in like manner the witness testified about Patent No. 885,136, patented February 28, 1911, to Thomas Bilyeu and W. S. Overlin, and assigned direct to the International Money Machine Company. That the purpose of this machine was the same as that of the patent to Bilyeu hereinbefore last recited, No. 1,114,574, and the witness testified that the Lindeloff patent was cited against that application, and that as an expert in his judgment the claims of the Lindeloff patent dominated this patent in the same way that they did the patent previously spoken of, the original patent.

And the witness was permitted further to testify, in substance, in response to questions by counsel for defendants, that the witness referred to the patent in speaking about citing; that they generally made a positive rejection in view of that as meeting it, as anticipating the claims; they reject the claim to which that patent applies; that in the prosecution of an application through the Patent Office the Solicitor and Examiner give information back and forth until they finally get exactly what is thought to be patentable by the Patent Office; that the Patent Office delivers a written opinion to the applicant, that he is not entitled to a patent because there has been another patent prior to that already issued, but that when they do not reject it, but issue a patent, they do not tell him that, they simply cite the art, cite the patent; that the Department did not express any opinion regarding the infringement, and that the witness did not express any opinion when that particular patent was issued, not as dominating, simply anticipating.

And thereupon, in view of the evidence, counsel for defendants moved to have the evidence stricken out.

And being further examined by the District Attorney, the witness testified that a letter of rejection is written in which the patent is identified and the applicant is told that his claim is rejected in view of that patent, in anticipation, but that when it was not rejected, if it was not to be rejected on that patent, that patent would not be cited except in a friendly way perhaps, to show what the prior art was.

And in response to questions by the defendants' counsel, the witness stated that he believed in his judg-

ment claims 1 and 2 of the Lindeloff cover the construction disclosed by the Bilyeu machine; that that was witness' opinion after examination; that nobody in the Patent Office gave an opinion to Mr. Bilyeu about the dominating control referred to.

Whereupon counsel for the defendants said: "I think I am entitled to have that out, for it didn't go to Mr. Bilyeu."

The Court then said: "I understand they notified him of this prior patent."

Counsel for Defendants: "They didn't notify him of the witness' opinion as an expert, because it was not their duty to give him that information."

The Court: "That is clear, but they did notify him of the patent, of the prior patent."

Counsel for Defendants: "Yes, they cited the patent."

The Court: "And advised him of that, so he knew there was such a patent, and he took his own chances with references to disposition."

Counsel for Defendants: "I suppose, for his information about that, but he didn't have the benefit of this witness' opinion that the jury has."

The Court: "No, goes to the question of his good faith."

And the Court overruled the motion to strike out the testimony, and in so ruling committed error, which is Exception "E," and the witness testified that there were thirteen patents cited in the Bilyeu patent, issued prior to that time, including the Lindeloff.

VI

The Court erred in admitting the following testimony:

The witness testified further about Application 555,552, filed April 14, 1910, by Bilyeu, Overlin and Gridley, and still pending; that the assignment was made to the International Money Machine Company; that it was an invention to cover another machine of the Bilyeu Cashier type. After describing the invention, witness testified that there were ten patents cited against that.

Witness further, under the ruling of the Court, testified about Patent No. 617,201, which was forfeited and renewed under Serial No. 30,673, and was allowed on June 1, 1915, but had not yet been patented. An assignment of this case was made to the International Money Machine Company by the applicants, none to the United States Cashier Company. The purpose of this invention was to print a record of the amount of money delivered by the machine, and, after describing the machine, the witness testified that there were eleven patents cited against this patent.

The witness then testified about Application No. 638,434, filed by W. S. Overlin, assigned to the United States Cashier Company, and by mesne assignments to the International Money Machine Company. The filing was November 3, 1911. This was a machine for delivering paper currency. After describing the machine, the witness testified that there were nine patents cited

against this patent. One was a patent that had been issued to a man by the name of Cook. The Cook patent was No. 807,724, dated December 19, 1905, and in the witness' judgment Claim 63 of the Cook patent includes the drum structure disclosed in this application, and dominates it.

The witness then testified about Application No. 702,164, filed June 7, 1912, the Bank Cashier.

At this point it was admitted that negative in the indictment as to the ownership of the patents by the Company did not include the Bank Cashier, that it had been left out of the indictment inadvertently.

Thereupon the counsel for the defendants objected to evidence concerning the Bank Cashier, on the grounds stated in the following statement to the Court: "Now, that brings up a question, a good clean-cut question for your Honor to decide, whether or not it is sufficient in an indictment, any more than it is in a suit in equity, to charge a representation as being false. If I understand the rule of pleadings applicable to civil as well as criminal cases, when you allege a false and fraudulent representation, you haven't gone far enough by applying to it that epithet of fraud vituperative. What you have to do, as I understand, in a civil or criminal case, when you are depending upon false representations, is to state in what particular it is false; a false representation may not be fraudulent, and the mere designation of it by that adjective is not sufficient."

Whereupon, after argument of the District Attorney, the Court ruled as follows: "I think there is a

reason why this testimony is competent, and that is, it has been shown in evidence that this company advertised at a certain time that they had patents to these certain named machines, they owned the patents to certain named machines. The evidence up to this time shows that they didn't have patents to some of these machines they were then advertising. Now, that was either an intentional mis-statement, or it was an error of judgment and misinformation, and that becomes an important question, I suppose; it will be before this trial is through, for some triers of fact to determine in arriving at that question. I think the Government is entitled, in a case of this kind, where it depends on circumstances, to put in evidence other acts of a similar kind, transactions of a similar kind that happened at the same time. And when they advertised these machines the Government alleges they didn't have, they advertised another machine they didn't have at the same time, and it is for the Government to show the purpose and intent for which they advertised the machine, and for that reason I think it is competent. But I don't think for the purpose of showing that was one of the means by which the defendants intended to carry out that conspiracy. I think the Government is required in an indictment of this kind to negative those allegations, but it simply goes to the intent or purpose of the defendants."

And counsel for the defendants, further stating his objection, said: "I will have the record show that, the part of it I am sure about is that the indictment, in effect and legal substance, alleges by admitting that that

machine was patented, and that no issue is raised between the indictment and the plea of not guilty on that question."

And the Court overruled the defendants' objection, to which an exception was taken, which is Exception "F."

VII.

The Court erred in admitting the following testimony:

The witness, under said ruling, further testified about Application No. 702,164, filed by Nelson White, W. S. Overlin and F. A. Bullington, filed June 7, 1912. The title of the invention was a Mechanical Cashier, Adding and Listing Machine. The patent had not yet been granted. This was assigned to the United States Cashier Company, and afterwards to the International Money Machine Company by the Cashier Company. The machine comprised an adding machine with printing attachment to print the amount separately and to take totals. After describing the machine, the witness testified that there were twenty-four American patents, and two German and two English patents cited by the Examiner against that machine, and that that patent had been placed in interference by Nelson C. Oviatt, on September 29, 1914. There had been one hundred and forty-seven claims made in the application, and of these claims three were made counts in the issue of interference, and disregarding these leaves one hundred and forty-four, of which twenty have been allowed and one hundred and twenty-four rejected.

The witness then testified about Application 710,512 filed by W. S. Overlin, for Money Paying, Changing and Listing Machine, filed July 19, 1912. This was the machine called the Computing Machine, and the same machine that had been identified by the witness Overlin upon the stand as the Computing Machine which he had built. No patent had been granted. This had been assigned by Overlin to the United States Cashier Company, and by the Cashier Company to the International Money Machine Company. The purpose of the invention was to deliver coins of a value equal to the difference between an amount tendered and an amount to be deducted from it. After describing the machine, the witness testified that there were twenty-one United States patents cited against that machine, and three English patents and two German patents. That there were two patents to a man named Osborne cited against that patent, Osborne patent No. 864,185, dated August 27, 1907, and Osborne patent No. 982,853, dated January 31, 1911. The witness said he had examined the Osborne patent carefully; that it had been issued to the National Cash Register Company, Dayton, Ohio, as the assignee from Osborne, the inventor. There were one hundred and fifteen claims in the Osborne patent.

Whereupon the District Attorney asked the witness the following question: "Now, I wish you would make a comparison and show to the jury, I would like to have you do it carefully and in detail, whether or not this Osborne patent dominates and controls this change computing machine, and if it does so, in what manner it

does it, and what claims there are in the Osborne patent that do it.”

And the witness then testified, in answer to said question, that he found several which, in his judgment, included the construction of the machine shown here as the computing machine. The witness noted Claim 18 of the Osborne patent and read it: “Claim 18. In a change maker, the combination with a movable element, of means for actuating the same, according to the amount of the purchase, means for further actuating the same according to the amount received to bring it to a position representing the difference between the two amounts, and a money changer controlled by said movable element.” The witness then read Claim 47 of the Osborne patent, and Claim 100 and Claim 101, and then testified that the claims in the Osborne patent were fundamental and basic, and that in the judgment of the witness it would be extremely difficult for anyone to evade that patent, that the only way he could escape it would be to invalidate it. The witness testified that the Osborne patent was pending for sixteen years, and was finally passed upon and patent issued on August 27, 1907, and the life of the patent would be seventeen years from the date of that issue.

All of the foregoing testimony was taken and received over the objection of the defendants that it was not competent on the question of good faith, or for any other purpose, to prove that the patents or applications involved could be affected by citations of a prior patent, and an exception was allowed, which is Exception “G.”

VIII.

The Court erred in admitting the following testimony:

The witness testified about Application No. 728,853, filed by W. S. Overlin, for money deliveries on street cars, filed complete October 13, 1912, patented July 6, 1915, Patent No. 1,145,700. That machine is known as the Lightning Change Maker. This was assigned by Overlin to the United States Cashier Company, and by them to the International Money Machine Company. The machine differs primarily from the Bilyeu Cashier in that there is no handle here for operating and discharging. After describing the machine, the witness testified that through his reading of the Lindeloff patent he was led to believe that the first claim of Lindeloff includes the construction of this machine. That this patent was to issue to the International Money Machine Company, and was issued July 6, 1915, in the natural course.

This testimony was taken subject to the same objection and the same exception, which is Exception "H."

IX.

The Court erred in admitting the following testimony:

The witness testified about Application No. 729,093, filed by Robert L. Bailey, for a Change Making and Computing Machine, filed November 1, 1912. This was assigned by Bailey to the United States Cashier Com-

pany, and by them to the International Money Machine Company. The application was still pending, no patent having been granted. The purpose of the invention was to deliver the difference between an amount tendered and an amount to be deducted therefrom, similar in purpose to that of the Overlin computing machine which had been theretofore referred to.

The witness was asked the following question: "Now, what have you to say as to your opinion in regard to this patent being dominated by the Osborne patent, whether or not this is the same as the other computing machine, and to the same degree?"

The witness answered: "The machine shown in this application is within the claims of the Osborne patent which were formerly referred to, and dominated by it."

This evidence was taken over the objection and exception of the defendants, and is Exception "I."

X.

The Court erred in admitting the following testimony:

The witness testified that there was a patent, No. 737,958, issued September 1, 1903, to one Pfeifer, which was cited against the Bailey patent, and the witness said that he had examined the Pfeifer patent, and, in response to questions, stated that the Pfeifer patent was issued to Mast, Foss & Company of Springfield, Ohio, and that eighteen claims of that patent, in witness' judgment, included the construction of the Bailey machine as already shown.

This evidence was taken over the defendants' objection and exception, which is Exception "J."

XI.

The Court erred in admitting the following testimony:

The witness testified as to Application No. 729,704, for Currency Paying and Computing Machine, filed by W. S. Overlin, November 5, 1912, for a Mechanical Cashier, that being the official title. This was assigned to the United States Cashier Company, and by the Cashier Company to the International Money Machine Company, and no patent had yet been granted. It was an application for a machine designed to deliver either paper currency or coin, at the wish of the operator, one of those, a paper currency delivery machine, having been referred to hitherto. And after describing the machine, he testified that there were twenty-one patents cited against the application, three of which were German.

This evidence was admitted over the objection and exception of the defendants, which is Exception "K."

XII.

The Court erred in admitting the following testimony:

The next application was No. 742,958, which the witness testified was an application by Thomas Bilyeu, filed January 18, 1913, the title being Paper Money Deliveries; that a patent had not yet been granted. This

was assigned to United States Cashier Company, and by the Cashier Company to the International Money Machine Company. The purpose of this was to deliver paper money. The witness described the machine, which is similar to the description of a similar machine before given, and he testified that, in his opinion, the application for a currency payer, filed January 18, 1913, by Mr. Bilyeu, contained rather broad claims that had already been allowed.

This evidence was taken over the objection of the defendants, and the exception, which is Exception "L."

XIII.

The Court erred in admitting the following testimony:

The witness testified about Application No. 755,817, filed by Nelson White, March 20, 1913, for Adding and Listing Machine, no patent yet issued. This was assigned to the United States Cashier Company, and by it to the International Money Machine Company. This was an improvement in adding machine, and did not, of course, claim to be broadly new because the adding machine art is pretty old and the basic patents have expired. There were twelve claims allowed on this application, and fourteen objected to as not being clear enough to be understood so that the Examiner could take definite action upon them, and twenty-two were rejected. There was an amendment filed since that time on the application, but not yet acted on. The amendment was dated May 25, 1915, and its standing

at the time of the trial was that it was awaiting action on the part of the Patent Office. Against this patent the witness testified that there were ten patents cited, one English, one German, and the others United States; that the patents cited were Burroughs and Pike.

This evidence was taken over the objection and exception of the defendants, which is Exception "M."

XIV.

The Court erred in admitting the following testimony:

The witness testified concerning Application No. 767,335, filed by Thomas Bilyeu, May 13, 1913, for Paper Currency Paying Machine; no patent yet allowed. This was assigned to the United States Cashier Company, and by it to the International Money Machine Company. The purpose of this was to deliver paper currency in a flat condition, and was a further advance in that particular art. The witness testified that the claims allowed in that application were, he considered, broad. There were eight prior patents cited against that application during the consideration of that patent.

This evidence was taken over the same objection and exception, and is Exception "N."

XV.

The Court erred in admitting the following testimony:

The witness testified concerning Application No. 836,771, which was an application filed by Nelson White, May 6, 1914, for Ribbon Feeding Machine. This was assigned to the United States Cashier Company, and by the United States Cashier Company to the International Money Machine Company; that no patent has yet been granted on this application, the last action having been a rejection, and no amendment yet entered in the files. This was an improved mechanism for feeding and inking ribbon used in adding machines, typewriters, and other machines. The witness described the invention. There were ten claims in the application, of which three specific ones had been allowed, and the other seven rejected, and the witness testified that there were seven prior patents cited against this application.

This evidence was taken over the same objection and exception, which is Exception "O."

XVI.

The Court erred in admitting the following testimony:

The witness testified concerning Application No. 838,065, filed by Nelson White, May 12, 1914, for a Coin Delivery Machine, no patent yet issued on the application. This was assigned to the United States Cashier Company, and by them to the International Money Machine Company. This was a machine designed for the same purpose as the so-called Lightning Change Maker. It was a complete reorganization, different organization. It was broadly to select and dis-

charge coins by the depression of a key. After describing the invention, the witness testified that there had been eleven prior patents cited by the patent office in relation to this application.

This evidence was taken over the same objection and exception, which is Exception "P."

XVII.

The Court erred in giving the following instruction:

"It has been truly said in argument that one of the cardinal points in this case is the intent of the defendants. But what intent? Was it their intent that they could make the business of the United States Cashier Company a success? Was it their belief that they could make the enterprise of the United States Cashier Company successful? The answer to these questions would necessarily be No. If they agreed to make false and fraudulent pretenses, representations or promises; if they agreed to make false and fraudulent representations and assurances, for the purpose of deceiving the investors and the public in respect to the true condition of affairs of the corporation, or the value of its stock, then the ultimate intent to make the business of the corporation a success, or the ultimate belief of the defendants that they could finally make it a success, would by no means furnish any condonation or legal excuse for the false and fraudulent representations, which they would under the circumstances agree to make in order to induce the investors and the public to pay over their money."

This instruction was given over the objection and exception of defendants, which is Exception "Q."

XVIII.

The Court erred in giving the following instruction:

"In considering this question, the question of and concerning the intent to defraud, you must direct your attention to the intent presented by the particular transaction set out in the indictment. If these defendants agreed that they would put forth the false representations or promises alleged, for the purpose of deceiving and misleading investors and the public into paying over their money, then it matters not how confident they may have been that they would be able to make the business or the corporation a success, or how confident they may have been that they would be able to return that money without loss, or with profit, because the representations which they would have agreed to make would be made for the purpose of getting the money in a wrongful manner, and they could not, under such circumstances, make them rightful by pointing to some ultimate good intent."

This instruction was given over the objection and exception of defendants, which is Exception "R."

XIX.

The Court erred in giving the following instruction:

"The parallel between such a case as I have presented and the crime of embezzlement is very close.

It is a well known fact that nearly every man who embezzles money expects that he will be able to pay it back without loss; but his taking is wrongful, and his intent to pay it back without loss cannot cancel the wrong. And so in this case, if the defendants, by means of the false and fraudulent representations set out in the indictment, agreed to mislead investors and the public generally into paying over to them or to the Cashier Company their money and their property, then their belief that they could ultimately return that money without loss and with profit would not condone the wrong in getting the money by deception."

This instruction was given over the objection and exception of the defendants, which is Exception "S."

Martin L. Pipes,
J. J. Fitzgerald,
John F. Logan,

Attorneys for Defendants Frank Menefee, B. F.
Bonnewell, H. M. Todd, and Oscar A. Campbell.

Filed February 11, 1916. G. H. Marsh, Clerk.

And afterwards, to-wit, on Friday, the 11th day of February, 1916, the same being the 89th judicial day of the regular November, 1915, term of said Court; Present: the Honorable Charles E. Wolverton, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

ORDER ALLOWING WRIT OF ERROR.

Frank Menefee, B. F. Bonnewell, H. M. Todd and Oscar A. Campbell, the defendants in the above entitled cause, having filed herein and presented to the court their petition praying for the allowance of a Writ of Error from the United States Circuit Court of Appeals for the Ninth Circuit to the above-entitled court, and having submitted therewith the Assignment of Errors intended to be urged by them; praying also that a transcript of the record, proceedings and papers in this cause, duly authenticated, be sent to said United States Circuit Court of Appeals for the Ninth Circuit, and praying also that meanwhile all further proceedings in the above entitled District Court be suspended, stayed and superseded, and that sentence and execution herein be stayed until the final disposition of said Writ of Error in the aforesaid United States Circuit Court of Appeals;

NOW, THEREFORE, in consideration of the premises, and the Court being fully advised, and the above named defendant Frank Menefee having heretofore submitted to the above entitled court his bond for appearance in the United States District Court for the District of Oregon, or in the United States Circuit Court of Appeals for the Ninth Circuit, as may hereafter in this cause be ordered, in the sum of five thousand dollars (\$5,000.00), and the defendants B. F. Bonnewell, H. M. Todd and Oscar A. Campbell, having heretofore submitted to the said court bonds for appearance therein each in the sum of twenty-five hun-

dred dollars (\$2,500.00) said sums being the amounts of bail heretofore fixed by this court for the said defendants, and said bond and bonds having been heretofore accepted and approved by this Court:

IT IS HEREBY ORDERED that the aforesaid Writ of Error be, and the same is, hereby allowed; and

IT IS FURTHER ORDERED that a transcript of the record, proceedings, and papers in this cause, duly authenticated, be sent to the aforesaid United States Circuit Court of Appeals for the Ninth Circuit; and

IT IS FURTHER ORDERED that all further proceedings in this above-entitled District Court be suspended, stayed, and superseded until the final disposition of said Writ of Error in the aforesaid United States Circuit Court of Appeals for the Ninth Circuit; and

IT IS FURTHER ORDERED that sentence and execution herein be stayed until the final disposition of said Writ of Error in the aforesaid United States Circuit Court of Appeals for the Ninth Circuit; and

IT IS FURTHER ORDERED that the bond for costs upon the Writ of Error herein be, and it is hereby, fixed at the sum of one hundred dollars.

Dated February 11, 1916.

Chas. E. Wolverton,
United States District Judge.

Filed February 11, 1916. G. H. Marsh, Clerk.

And afterwards, to-wit, on the 28th day of February, 1916, there was duly filed in said Court, and cause, a Praecipe for Transcript, in words and figures as follows, to-wit:

PRAECIPE FOR TRANSCRIPT.

*In the District Court of the United States for the
District of Oregon.*

United States of America,

vs.

Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E.
Gernert, B. F. Bonnewell, H. M. Todd, Joseph
Hunter, O. L. Hopson, P. E. Muraine and Oscar
A. Campbell, Defendants.

February 26, 1916.

G. H. Marsh,
Clerk of said Court,
City.

Dear Sir:

You will please prepare a transcript on appeal in the above entitled cause for the defendants Frank Menefee, B. F. Bonnewell, H. M. Todd and Oscar A. Campbell, and make a part of said transcript as follows:

1. Indictment.
2. Bill of Exceptions.
3. Judgment of the Court.

Also the Journal entries as follows:

Book 25:

1. Return of indictment, page 79.
2. Plea of not guilty, page 103.
3. Another plea of not guilty, page 206.
4. The beginning of the trial, bottom page 337 and 338.
5. Drawing of jury, page 340.
6. Appearance of Mr. Atkins, page 370.
7. Motion for directed verdict, page 393.
8. Order on said motions, page 396.
9. Retirement of jury, page 402.
10. Return of verdict, and verdict, page 403.
11. Sentence, page 27 of Book 26.
12. Allowance of writ of error, page 247, page 26.
13. Petition for writ, and assignment of errors, page

It is stipulated in this case, as you will find by the stipulation set out in the Bill of Exceptions, that you shall, at the time the transcript is prepared for filing with the Circuit Court of Appeals, transmit to the clerk of said court, in the original, the following exhibits:

- Government Exhibits 1 to 16, inclusive;
- Government Exhibit 22;
- Government Exhibits 28 to 30, inclusive;
- Government Exhibits 34 and 35;
- Government Exhibits 45 and 46;
- Government Exhibit 53;
- Government Exhibits 55 to 57, inclusive;
- Government Exhibits 59 to 70, inclusive;

Government Exhibits 74 to 85, inclusive;
Government Exhibits 92 to 108, inclusive;
Government Exhibits 110 to 220, inclusive;
Government Exhibits 222 to 442, inclusive.

These are to be transmitted in the original and will not form a part of the transcript proper, nor will they be printed.

Yours very truly,

Martin L. Pipes.

And afterwards, to wit, on the 13th day of March, 1916,
there was duly filed in said Court a Bond for Costs
on Writ of Error, in words and figures as follows,
to wit:

BOND FOR COSTS ON WRIT OF ERROR.

*In the District Court of the United States for the
District of Oregon.*

United States of America

vs.

Frank Menefee, B. F. Bonnewell, H. M.
Todd, and Oscar A. Campbell,
Defendants.

BOND FOR COSTS.

WHEREAS, the above named defendants have taken
a writ of error, which has been allowed by the judge of
the above entitled court; and

WHEREAS, the said court has fixed the sum of one hundred dollars (\$100) as the amount of the bond to be given by the said defendants for costs on said appeal, in case the same should be affirmed:

NOW THEREFORE, Frank Menefee, B. F. Bonnewell, H. M. Todd and Oscar A. Campbell, as principals, and Fred V. Conley, as surety, hereby acknowledge themselves, their heirs, administrators and assigns, firmly bound, jointly and severally, to the United States of America, to pay to the United States of America the sum of one hundred dollars (\$100).

Done under our hands and seals this 11th day of March, 1916.

The condition of the above obligation is such that if the said defendants shall pay the costs that may be adjudged against them in the said United States Circuit Court of Appeals, if the said judgment be affirmed, then in that case the above obligation to be void; otherwise in full force and effect.

Frank Menefee (Seal)

Fred V. Conley (Seal)

B. F. Bonnewell (Seal)

By John F. Logan

H. M. Todd (Seal)

By John F. Logan

Oscar A. Campbell

By John A. Logan (Seal)

State of Oregon,
County of Multnomah,—ss.

I, Fred V. Conley, being first duly sworn, depose and say: That I am the surety in the above entitled bond, and that I am worth the sum of two hundred dollars (\$200) over and above my just debts and liabilities and property exempt from execution.

Fred V. Conley.

Subscribed and sworn to before me this March 11th,
1916.

E. M. Hall,

Notary Public for Oregon.

(Seal) My commission expires Jan. 21, 1917.

Approved, March 13, 1916.

Clarence L. Reames, U. S. Attorney.

R. S. Bean, Judge.

State of Oregon,
County of Multnomah,—ss.

Due service of the within bond is hereby accepted in Multnomah County, Oregon, this 13th day of March, 1916.

Clarence L. Reames,

Attorney for U. S.

Filed March 13, 1916.

G. H. Marsh, Clerk.

UNITED STATES OF AMERICA,)
) ss.
 District of Oregon.)

I, G. H. MARSH, Clerk of the District Court of the United States, for the District of Oregon, do hereby certify that I have prepared the foregoing transcript of record on writ of error in the case in which the United States of America is plaintiff and defendant in error, and Frank Menefee, B. F. Bonnewell, H. M. Todd and Oscar A. Campbell are defendants and plaintiffs in error, in accordance with the law and the rules of court and in accordance with the praecipe of said plaintiffs in error, and that the said transcript is a full, true, and correct transcript of the record and proceedings had in said court in said cause in accordance with the said praecipe as the same appear of record and on file at my office and in my custody.

And I further certify that the cost of the foregoing transcript of record is \$. for clerk's fees for preparing the said transcript, and \$ for printing said transcript, and that the same has been paid by said plaintiff in error.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at Portland, in said district, this day of March, 1916.

Clerk.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

FRANK MENEFEE, B. F. BONNEWELL, H. M.

TODD and OSCAR A. CAMPBELL,

Plaintiffs in Error.

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

BRIEF OF APPELLANTS

Plaintiffs in Error

Writ of Error to the District Court of the United
States for the District of Oregon.

MARTIN L. PIPES,

J. J. FITZGERALD,

JOHN F. LOGAN,

Attorneys for Plaintiffs in Error.

Filed

APR 21 1916

F. D. Monckton,
Clerk.

No. _____

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

FRANK MENEFEE, B. F. BONNEWELL, H. M.
TODD and OSCAR A. CAMPBELL,
Plaintiffs in Error.

VS.

THE UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF OF APPELLANTS

Writ of Error to the District Court of the United
States for the District of Oregon.

STATEMENT OF THE CASE.

The indictment in this case charges the defendants with entering into a conspiracy to violate Section 215 of the Criminal Code of the United States relating to the use of the United States mails to promote fraud. The conspiracy is alleged to have begun on the 1st day of September, 1910, and to have continued until the 1st day of January, 1915. The substance of the indictment, avoiding only its repetitions, alleged that the United States Cashier Company was and is a corporation organized and

existing under and by virtue of the laws of the State of Oregon, with its principal office and place of business in the City of Portland, Oregon; that between the 1st day of September, 1910, and the 31st day of January, 1914, the defendant Frank Menefee was the duly elected, qualified and acting director and president of the said corporation, and was its general manager between the 28th day of September, 1910, and the 31st day of January, 1914; that the defendant LeMonn, who is not a party to this writ, was the duly elected, qualified and acting sales manager of said corporation between the 1st day of September, 1910, and the 1st day of November, 1912; that the defendant O. E. Gernert was an agent and salesman and acting assistant sales manager of the corporation between the 1st day of January, 1911, and the 1st day of April, 1912; that the defendant Bonnewell was the fiscal agent of the corporation, and an agent and salesman thereof, between the 15th day of April, 1911, and the 31st day of January, 1914; that the defendant Todd was a sales agent between the 15th day of April, 1911, and the 1st day of December, 1913; that the defendant Joseph Hunter was sales agent between the 26th day of May, 1911, and the 31st day of January, 1914; that the defendants Hopson and Muraine, who are not parties to this writ, were respectively sales agents, the first between the 23rd day of November, 1910, and the 1st day of July, 1913, and the latter between the 6th day of March, 1911, and the 31st day of January,

1914; that the defendant Campbell was a director between the 12th day of June, 1911, and the 31st day of January, 1914, and was vice-president between the 30th day of January, 1912, and the 31st day of January, 1914; that the defendant Bilyeu for whom a verdict was directed by the lower court, was a qualified and acting director of said corporation between the 9th day of June, 1913, and the 31st day of January, 1914. That between the 1st day of September, 1910, and the 31st day of January, 1914, the capital stock of the corporation amounted to the sum of \$1,200,000, divided into 120,000 shares of the par value, as fixed in the articles of incorporation, of \$10 a share.

The indictment then charges that the plaintiffs in error, with the other defendants, on or about the 1st of September, 1910, conspired to commit the acts made offenses and crimes by the laws of the United States to prevent the use of the United States mails to promote fraud, to-wit: Section 215 of the Criminal Code of the United States, and particularly conspired to devise and execute a scheme and artifice to defraud, to be effected by means of the postoffice establishment of the United States, and to obtain money and property by means of false and fraudulent representations, pretenses and promises, from fifty-five persons named, thereafter in the indictment called Investors, and from the public generally, by inducing them to open communications with the defendants, and with the United States Cashier Company, inducing them,

and the public generally, to purchase from the defendants and said corporation shares of stock of said corporation, and to pay therefor, to the defendants and the company, sums of money and property, the said payment and transfer to be procured by false and fraudulent representations of the defendants to the said Investors and to the public.

It is further charged that it was a part of the said conspiracy that the said scheme and artifice should be carried out by the defendants and effected by them by the further means, methods, manners and plans, to-wit: That they would cause, induce and incite said Investors, and the public, to pay and deliver to the defendants and the corporation, in exchange for the shares of stock, money and property of the value of more than the sum of \$1,000,000, by means of false and fraudulent representations thereafter set forth, and to swindle and cheat the Investors, and other persons to the grand jurors unknown, and the public generally, out of said sums of money and property.

It is further alleged that the said conspiracy was to be effected by means of printed advertisements inserted in newspapers, pamphlets, catalogues, circulars and letters, which were to be transmitted and caused to be transmitted through the United States postoffice establishment to the Investors and other persons, representing and pretending that the said United States Cashier Company owned the patents to a certain change com-

puting machine, a certain bank cashier machine, a certain lightning change maker, a certain currency paying machine, and a certain new style adding machine, and that the said corporation, namely, the United States Cashier Company, was engaged in the business of manufacturing and selling said machines, and each and every and all thereof, and that, on account of said alleged ownership of said patents and the said alleged manufacturing of said machines by said corporation, the said shares of stock in said corporation were of great commercial value and large dividends would be by said corporation declared and paid to the Investors and purchasers, and that the said company would declare and pay to the Investors large and certain dividends upon said stock within six months from the date of the purchase thereof; that the said United States Cashier Company was the owner and in the possession of large *bona fide* orders for the purchase of said machines, and that on account of said orders for the said machines the said corporation would make a large and certain profit; that the financial condition of the said corporation was excellent, and the assets of the corporation far exceeded in value the total amount of the liabilities against and owned by said corporation; that a certain large amount of the capital stock of said corporation, the exact amount being to the grand jurors unknown, offered for sale to the Investors, belonged to and was the property of the corporation, and that the money derived from the sale

thereof would be invested by said corporation in such manner as to increase the assets of said corporation and to make its shares of stock more valuable, and particularly for the purpose of purchasing and building factories in which to increase the manufacture of said machines, and further, that inasmuch as the assets of said corporation were greater than the liabilities, the defendants were justified in raising and increasing the selling price of said shares of stock from the par value of \$10 to \$11, and from \$11 to \$12.50, and from \$12.50 to \$15, and from \$15 to \$20, and from \$20 to \$30, and from \$30 to \$50.

The indictment then (page 16, Transcript of Record) proceeds to negative the truth of the representations, in substance as follows: That in truth and in fact, and as the defendants well knew, during the dates mentioned, neither the said corporation nor any of the defendants owned the patents to said certain change computing machine, or to said lightning change maker, or to said certain currency paying machine, or to said certain new style adding machine.

It will be noticed here that one of the errors relates to this omission, that the indictment does not negative the representation that the said company owned the bank cashier machine.

The indictment then proceeds in its negation, and alleges that in truth and in fact, and as the defendants well knew, at the dates specified in the indictment the United States Cashier Company was

not engaged in either the business of manufacturing or selling said machines, or any thereof, but on the contrary its business was to sell and dispose of the said shares of stock; and further, that in truth and in fact, and as the defendants well knew, on the dates specified the said shares of stock were of little value, and of practically no value whatsoever, and were practically worthless, and that in truth and in fact, which the defendants well knew, no dividends whatsoever would ever be by said corporation paid to the Investors, or to any person who should purchase the said shares, and that none of the Investors or purchasers of the said stock would receive any dividends whatsoever; and that the said company was neither the owner nor in the possession of the said alleged *bona fide* orders for the purchase of said shares, and that the said financial condition of the said corporation was not excellent, but that it was at all of said times absolutely insolvent, and that the value of the assets of the corporation amounted to a sum much less than the total amount of the liabilities against and owed by said corporation, and that a large amount of the shares of the corporation represented to be the property of the corporation consisted of shares of stock owned by the defendants, and that all of the sums of money received on account of the sales thereof would be appropriated by the defendants, and none of the same would be paid into the treasury of the corporation, and that none of the defendants were, at any time, on account of the financial condition

of said corporation, justified in raising the selling price of the said shares of stock, and that in truth and in fact, and as the defendants well knew, that at all the dates mentioned in the indictment every person who would purchase the shares of stock from the defendants, or from the corporation, would suffer a loss on account of the said transaction of all the sums of money paid therefor.

Then the indictment proceeds to say that it was a further part of the said conspiracy that the scheme and artifice was to be carried out by the further means and plans that the defendants would from time to time, during the existence of the conspiracy, fraudulently publish untrue written and printed statements of the assets of the corporation and of the liabilities, and of the financial condition thereof, and that said statements of the said assets would be sums greatly in excess of the true value of the assets of the corporation, and that from said statements there would be omitted from the liabilities owed by said corporation a sum amounting to more than half a million dollars.

That it was a further part of said conspiracy that the said artifice and scheme should be carried out by selling the shares of stock to investors in the States of Oregon, Washington, California, Idaho, Montana, Wyoming, Utah, Texas, Iowa, North Dakota, Michigan, Illinois, Colorado, New York, and other places to the grand jurors unknown.

It was further charged to be a part of said conspiracy that the defendants would so manage and

control the business affairs of said corporation that more than twenty-five per cent of all the sums of money received from the investors and paid over to the corporation for the said stock would be appropriated by the defendants to their own use and gain.

It was further charged to be a part of the said conspiracy that the scheme and artifice should be carried out by the further means that the defendants would increase the selling price of the said shares of stock from \$10 to \$11, and from \$11 to \$12.50, and from \$12.50 to \$15, and from \$15 to \$20, and from \$20 to \$30, and from \$30 to \$50, each.

It was charged that it was a part of the said conspiracy to execute the said scheme and artifice, and to attempt so to do, by placing in the postoffice of the United States at Portland, Oregon, the said newspapers, pamphlets, catalogues, circulars and letters, which would request the Investors to pay the defendants money for said stock, all of the said documents to be delivered by the postoffice establishment to the persons to whom they were addressed, in pursuance of the conspiracy.

It is then charged that the conspiracy was to continue from the 1st day of September, 1910, until the 1st day of January, 1915, and that it was a continuing conspiracy, and that the defendants would continue to be parties to said conspiracy and continue to commit the acts thereinbefore set forth in detail, and it is then alleged that the conspiracy in fact continued to the 1st day of January, 1915, and was in operation during that time.

It is then alleged that in pursuance of the conspiracy, and to effect the object thereof, several of the defendants committed the overt acts by depositing letters in the postoffice at Portland, Oregon, which are set out in the indictment, and which are omitted from the statement because they do not enter into the questions under the assignments of error. Only one of these letters, that dated the 7th of June, 1912, and sent by the defendant Menefee, and constituting the third overt act, found on pages 35 to 43, of the Transcript of Record, will be hereafter briefly referred to, but is omitted here in order to avoid unnecessary prolixity.

The bill of exceptions shows, following the language of the indictment, that the Government offered evidence tending to prove all these allegations. The detail of that evidence is not stated in the bill of exceptions except that a great many letters and documents introduced as exhibits in the case have been referred to in the bill of exceptions, and it is stipulated between the learned district attorney and the defendant's counsel that all of these exhibits may be deemed a part of the record and referred to in the same manner as if they had been printed in the record. So far as the case of the plaintiffs in error is concerned, it is not deemed necessary or helpful to consider these exhibits, or any other part of the record than the evidence recited in the bill of exceptions, in order to determine the validity of their assignments of error.

The Government identified and offered in evidence, which were received, copies of six patents and twelve applications pending. All but four of these became the property of the United States Cashier Company, and those four were assigned to the International Money Machine Company. (Page 192, Transcript of Record.) The connection of the International Money Machine Company is shown by evidence recited on page 230, of the Transcript of Record. It shows that about January, 1914, the defendant Menefee and the other officers and directors of the United States Cashier Company, finding that the manufacture of the machines at Portland, where a factory had been established and had been in operation, was not satisfactory and economical, and that it lacked capital, caused to be organized and incorporated the International Money Machine Company at Terre Haute, Indiana, and had procured additional subscriptions to the capital stock of that corporation; that an arrangement had been made by which the United States Cashier Company transferred to the International Money Machine Company substantially all of its assets in Oregon, and had effected a contract with the International Company and promoters by which the United States Cashier Company received something more than fifty per cent of the paid up stock in the International Company, and that the design and purpose of the defendants and officers of the United States Cashier Company was to continue the manufacture of the machines which they had commenced

to manufacture, and to conduct the business in Terre Haute, Indiana, and that that company had proceeded, and at the time of the trial was proceeding to manufacture and sell one of the machines involved and for which an application for a patent was pending to the International Money Machine Company. One of the machines recently manufactured by the Indiana Company was used in evidence and demonstrated in the presence of the jury to show its workings.

There was evidence tending to show that the assignments made of the applications and patents by the several persons named in the testimony had been made by the applicants, or by the Cashier Company, to the International Money Machine Company as a part of the assets of the Cashier Company under the arrangement and contract hereinbefore referred to.

At the time of the publication of the advertisements claiming that the United States Cashier Company owned the patents, it owned only the Potter patent. The other patents obtained by the Cashier Company, or transferred directly to the International Company, in pursuance of the said arrangement, were issued afterwards, and a number of applications for patents for the different machines were filed and were pending in the department at Washington, some of the claims having been allowed and some rejected.

The questions involved in this writ are more particularly elaborated in the assignments of error

printed below and in the argument upon the law and the facts. For the purpose of the present statement the points may be explained as follows:

The indictment charged that the defendants falsely and fraudulently represented that the company owned the patents to five machines, designated in the indictment as the change computing machine, the bank cashier, the lightning change maker, currency paying machine and a new style adding machine. The evidence showed that these representations were made in advertisements in the Portland Oregonian, Portland Journal and Postland Evening Telegram, newspapers published in Portland and having a wide circulation, and the advertisements were contained in the months of October and November, and perhaps one in December, 1911, and stated that the defendants owned and controlled the patents to the said five machines. The indictment negatived the said ownership as to all of the machines except the bank cashier machine, which it did not negative. The evidence showed that the defendant Menefee wrote a letter, the substance of which was sent out to the public, reciting the patent situation as of its date. The date was June 7, 1912, and the letter was written to Dr. A. A. Milliken, of Fort Jones, California. This letter is the third of the overt acts charged in the indictment, and is found on pages 36 to 43, Transcript of Record. So far as we know the truth of this letter is not disputed as a true statement of the patent situation as of its date.

One question at issue was whether or not the representation as to the ownership of the patents was not only untrue but was fraudulent and made for the fraudulent purpose of selling the stock. The Government itself offered the copies of the patents and applications procured by the defendants thereafter, and the defendants had a right to refer to their conduct in seeking to secure patents as bearing upon that question. In that situation the Government offered Mr. Oviatt as a witness. As his evidence will have to be more particularly referred to hereafter, it is sufficient here to say that its tendency was to show that Mr. Oviatt, in 1909, had an arrangement with Thomas Bilyeu to invent a coin-paying machine, and that according to Mr. Oviatt's testimony Mr. Bilyeu had refused to carry out the arrangement, whereupon Mr. Oviatt invented a machine called the Payograph, and the testimony of Mr. Oviatt had the purpose and effect of indicating that the Payograph machine was in such conflict with the machine of the defendants secured from Bilyeu as to affect the value of the stock of the company. The Payograph had not been patented. The point involved is upon admitting the testimony of Oviatt over the objection and exception of the defendants upon the question of the good faith of the defendants.

Another point involved is as follows: The Government was permitted to prove that the patent for the bank cashier, which had not been negatived in the indictment, had not been issued, although appli-

cation was pending for it. That was received by the court over the objection and exception of the defendants, and the defendants claim that that was error, because it allowed the Government to prove a fact, the truth of which the indictment had not negatived.

Another point involved arises upon the testimony of E. D. Sewell. He was an expert upon patents from the Patent Office at Washington, and was fully qualified to testify, and he testified fully concerning the patents and applications. In a number of cases he was allowed to show that in the process of applying for the patents by the defendants, and their assignors, the Patent Office had made a reference, which was the customary practice, to prior patents issued that might interfere or be infringed by the patents pending. This witness showed that the practice of the department in passing upon the question of the patentability of a claim was to cite the applicant to prior inventions patented, and such proceedings are then had as that, if the Patent Office considers that the claim applied for would be an infringement of a prior patent, the claim would be rejected, otherwise it would be allowed. A great number of references to prior patents in respect of the applications made and of the patents actually issued were allowed to be testified to by the witness and appeared in the copies of the patents and applications in evidence. All of this testimony was objected to on the ground that when a claim had been allowed or a patent issued, the fact

that prior patents had been referred to would not be competent in the case at bar against the defendants. The court admitted that evidence upon the question of the good or bad faith of the defendants in this case. The particulars of this testimony appear hereafter.

Another point involved arises as follows: One of the allegations of the indictment, and the central and fundamental one (bottom of page 16 and top of page 17, Transcript of Record), is as follows:

“Whereas, in truth and in fact, and as the defendants and each and every and all thereof, at and during and between all of the times and dates mentioned, specified and stated in this indictment, then and there well knew, the said corporation, namely, the United States Cashier Company, was not engaged in either the business of manufacturing or selling said machines, or any thereof, but on the contrary its business was to sell and dispose of the said shares of stock.”

That was a negative of the allegation made prior thereto in the indictment (page 13 and 14, Transcript of Record) as follows:

“That the defendants represented that the United States Cashier Company was engaged in the business of manufacturing and selling said machines, and each and every and all thereof, and that on account of the said alleged ownership of said patents and the said alleged manufacturing of said machines by said corporation, the said shares of stock were of great commercial value, and that large dividends

would be by said corporation declared and paid to the investors."

At divers places in the indictment the promises and assurances of the defendants were set out indicating representations of great value of the stock to the proposed stockholders. The court, however, instructed the jury in effect and substance that the defendants could be convicted even though they honestly believed, at the time the said representations were made, that the stock would be valuable and produce a profit to the investors. The instructions referred to constitute assignments XVII, XVIII and XIX of the assignments of error hereinafter set forth. The giving of the said instructions was duly excepted to.

The specifications of error, together with the substance of the testimony and of the instructions referred to, are as follows:

ASSIGNMENTS OF ERROR.

*In the District Court of the United States for the
District of Oregon.*

United States of America,

vs.

Frank Menefee, B. F. Bonnewell, H. M.

Todd and Oscar A. Campbell,

Defendants.

ASSIGNMENTS OF ERROR OF DEFENDANTS FRANK
MENEFEE, B. F. BONNEWELL, H. M. TODD
and OSCAR CAMPBELL.

The defendants Frank Menefee, B. F. Bonnewell, H. M. Todd and Oscar A. Campbell, in this action, in connection with their petition for a writ of error, make the following assignments of error, which they aver occurred upon the trial of the cause, to-wit:

I.

The court erred in admitting testimony, over the objection of the defendants, contained in objection and exception "A," in the bill of exceptions, which is the testimony of N. C. Oviatt, who testified that his name was Nelson C. Oviatt; that he lived at Detroit, Michigan, and was engaged in the manufacture of coin-paying machines, called the Payograph, was president of the Payograph Company, which was a corporation organized under the laws of Michigan, incorporated for \$300,000, with a principal office in Detroit, and having machines manufactured for it in New Haven, Connecticut; that he was acquainted with the defendant Thomas Billeu, and met him first in the summer of 1909 in the Ainsworth Block, Portland, Oregon; that the witness had been in Portland since 1892, first in the manufacture of silver spoons, later as an employe of the County of Multnomah, in the tax collection department, and later as coast agent for the Compograph Company of Chicago, in the sale of adding

machines, and also represented the Brandt Cashier Company in the sale of Brandt Automatic Cashiers; that he had devised the principle of a coin-paying machine and had gone to Mr. Glover, a public engineer with a view of having him develop it for the witness, but he was unable to do so, and that he presented it to Mr. Bilyeu; that Mr. Bilyeu took it under consideration, and after two days of deliberation said he would take it on, with the understanding that he would have forty per cent of the results and that the witness was to have the other sixty per cent of the results; that the agreement was not in writing; that the witness was to turn over to Bilyeu his ideas and Bilyeu was to proceed with the development and put it into working shape and build a model.

Which evidence was stated at the time by the district attorney, in response to an objection made by the defendants' counsel, to be for the purpose of showing that back in 1909 the witness, Mr. Oviatt, was working on a coin-paying machine, and that he had made a full and complete disclosure to the defendant Bilyeu, and that the Government was going then to proceed to follow the making of the machine known as the Payograph, and the knowledge of the Payograph as it was brought home to the defendants, the attempted sale of a similar machine by the defendants in England, and their knowledge of the Payograph applications pending there, and conversations had between defendants Bilyeu and Menefee and LeMonn with this witness;

bring these transactions down to the date where LeMonn made an investigation of the Payograph machines personally and sent the telegram that had been introduced in evidence. And, in response to an inquiry by defendants' counsel, the district attorney said that the evidence would go to the extent of showing the knowledge of the defendants of the work that Mr. Oviatt was doing.

This evidence was admitted over the said objection upon the question of the good faith of the defendants.

II.

The court erred in admitting the following testimony:

The witness continued, under the said ruling of the court, for the purpose as aforesaid, and testified that he disclosed to Mr. Bilyeu the basic principle, which was the connection of each individual key with a selector bar or rod so that by a depression of that key the proper ejector or ejectors would be turned from a non-paying to a paying position; that Mr. Bilyeu said he would undertake the work, with the understanding that the results would be divided, sixty per cent to the witness and forty per cent to Bilyeu, and that was agreeable to witness, and that they shook hands on it. That Mr. Bilyeu said to him, "I will take you out to my model maker," which he did, in South Portland, to Mr. Overlin; that he had not seen Mr. Overlin before, and that Mr. Bilyeu introduced him to Mr. Overlin, and said that the witness had been associated with

Mr. Potter in the development of the machine and had not been treated fairly by Mr. Potter, that witness had devised a machine of his own and arranged with Bilyeu to develop it and wanted Overlin to undertake the manufacture of the model; that Mr. Overlin accepted, and they returned to town; that Mr. Bilyeu advertised for a draftsman and put him to work in the Ainsworth Block; that a model was constructed; that a month or six weeks after that time Mr. Bilyeu said to the witness one day that he had been thinking the matter over for a week past, and had decided that the witness did not own anything in the device, and went on to say that he had applied for a patent in his own name, and the witness said there was nothing further to do except for witness to make a better machine, and that Mr. Bilyeu said he could not do it. That he went East the 2nd day of May, 1910, and went first to the Comptograph Company with sketches, and then to the Wales people, and finally arranged for the building of the machine, and completed it in August, 1910, and that was the Payograph machine; that he applied for a patent on the machine in August, 1911; that the first model was made in August, 1910, and that the second model was completed in 1912.

The witness was then shown three photographs, which were identified as photographs taken in August, 1910, of a machine he had just completed and demonstrated to the executive board of the Wales Adding Machine Company, and the Govern-

ment then offered the said three photographs in evidence, which were admitted over the defendants' objection and exception, which is exception "B," of the bill of exceptions.

III.

The court erred in admitting the following testimony:

The witness then continued, subject to the same ruling of the court, to testify that he returned to Portland the latter part of August, 1910; that he knew of a certain machine of the United States Cashier Company, known as the Bank Cashier, had heard of it and seen it, but never examined it closely; that he thought the machine was one that was covered by the application over the names of Bullington, White and Overlin; that in the year 1910 he met Mr. Bullington, and that he exhibited the three photographs in evidence to Mr. Bullington in August, 1910; that he met the defendant F. M. LeMonn in the office of the Payograph Company in Detroit in January, 1912, and that LeMonn told him that he had been at the office of the National Cash Register Company and had there been told of the Payograph; that LeMonn had a little booklet descriptive of the Payograph, which he said had been given to him by the paymaster. Witness identified a book which he said was exactly like the one LeMonn showed him; that it was issued by the Payograph Company, and that it was the one Le Monn brought to him at the time, one exactly like

it and of the same issue, and that LeMonn said he had received it from the National Cash Register Company. The said booklet, over defendants' objection, was admitted in evidence, which is exception "C," and which book is as follows:

The witness continued and testified that the defendant LeMonn said that he had been told of the Payograph by the paymaster, Mr. Myer, and wished to see it, and after questioning by the witness said that he had been with the United States Cashier Company but was not with them at the time; had got through selling stock and was east looking for other things to finance, and asked the witness if he did not want him to take hold of the Payograph and finance it, which the witness said he did not. The witness said he demonstrated the Payograph to LeMonn; that Mr. LeMonn expressed himself as pleased with it, went on east and left his address, with the request that the witness think over the matter of financing the proposition and communicate with him if they decided to take him on to do the work; that the machine he demonstrated to LeMonn was the one described in the little booklet; that there was no model of it. The witness further said he took half an hour to demonstrate the machine; that the machine would pay money, list it and add it; that he did not take the case off the machine, the mechanical part of it.

The witness, further testifying, said that he met Mr. Menefee in October, 1913; that Mr. Menefee came to his office in October, 1913, and told

him that he was the president of the United States Cashier Company, and asked what they were going to do with the British patents, or if the witness had sold them, and he said he had not; that Menefee asked what they were going to do with them, and he said he had no other plans than to retain them; that Mr. Menefee then told him they were arranging for a syndicate in Britain to take over their British rights, and that he felt upon investigation by the people there they might run upon the application and it might possibly interfere with the deal, and that he thought for the good of both it might be well to make some arrangement whereby the patent of the Cashier Company in Great Britain would be included with the patent of the Oviatt machine; that Menefee described to him the deal, that it was to be a million dollar corporation, of which \$200,000 stock was to be paid to the United States Cashier Company, and \$50,000 in cash, which was to be divided between Mr. Bilyeu and the United States Cashier Company, and that if the witness would come into the deal it would be split in thirds. That Menefee wanted him to combine their entire interests in one large corporation. The witness said he took the matter under consideration, and afterwards, in about two weeks, told Menefee he would not entertain the deal.

The witness further testified that subsequent to this conversation, and at the request of defendants Bilyeu and Menefee, he had met said defendants in Chicago, and that they had attempted to get the

witness to go in with them upon a proposition by the terms of which the Payograph was to be included in the deal that the defendants had pending in England, and the two said defendants represented to witness that on account of the conflict in Great Britain between the machine of the United States Cashier Company the deal could not be closed without the co-operation of the witness. The witness further testified that he refused to consider said proposition. The witness further testified that the Payograph machine had been patented in the London patent office, and that the Payograph Company owned it.

Witness was asked to demonstrate the Payograph machine, a model of which was in the court room, which he did, and said that the adding machine was not his invention, but that the coin-paying device was his invention, and was connected with the adding machine so that when the key was depressed and the handle of the adding machine operated, the money is ejected into the hand or an envelope, and fully explained the working of his machine. He testified that his machine was so constructed that the adding machine could be used with or without the coin-paying mechanism, that they were detachable.

And thereafter, and in the course of the trial, Mr. Dobson, of counsel for Mr. LeMonn, asked the district attorney to have the Oviatt machine brought back into court, after Mr. Oviatt had been excused, and the next morning, at the opening of court, Mr.

Reames offered the said machine, stating that he did not claim the right to have it demonstrated, that the machine was to be shipped east, but that it was at the disposal of the defendants. Whereupon the counsel for these defendants stated to the court that they did not desire to have the machine demonstrated and that the machine could be sent east as far as they were concerned, but one of the jurors requested that the machine be demonstrated, and thereupon the witness proceeded to demonstrate the machine by actually operating it by putting money into it and by manipulating it, having the money paid out in envelopes according to the design and purpose, the said demonstration being made in the presence of the jury.

IV.

The court erred in admitting the testimony of E. D. Sewell, over the objection of the defendants, which is exception "D."

Mr. Sewell had testified that he lived at Washington, D. C., and had been employed in the United States Patent Office, for nine years in the examining corps, nine years and a half as assistant examiner, and about the same period as principal examiner, and for the remainder as an examiner of classification, and had detailed at length his duties, tending to show his qualifications as an expert in relation to patents, and the procedure in the patent office. He further testified that he had made an examination of the records of the patent

office to ascertain the patents and applications owned and standing in the name of, upon the records of the United States Patent Office, the United States Cashier Company; that his examination extended from January 1, 1909, to December 31, 1914, and he testified that the United States Cashier Company did not own a patent to an adding machine, nor did it, at the time of the examination of the witness, and did not have an application on file for an adding machine on October 29, 1911; nor did it have an application on file at that date for the Lightning Change Maker described; that a patent for the Lightning Change Maker was issued July 6, 1915, and the number of the patent was 1,145,700. That there was no application for the Change Computing Machine by the United States Cashier Company on October 29, 1911, and that the United States Cashier Company did not own any patent for any machine designed to do that work; that the United States Cashier Company did not own any patents to any machine which was designed to compute change for department stores and all classes of retail business, as described in the advertisement; that on the 29th day of October, 1911, the United States Cashier Company had no application on file for any machine that would do that work, and that from the 1st day of January, 1909, until the 31st day of December, 1914, the United States Cashier Company never did own patents to any of the machines described in the advertisement about which he had been asked.

And the witness testified that the patent which was issued on the 6th day of July, 1915, about which he had testified, was assigned to the International Money Machine Company, and witness presumed it was issued to them; that it had been assigned by the United States Cashier Company; that the patent was based on application made by W. S. Overlin; that except for the assignment it would have been issued to the Cashier Company, and the district attorney admitted that it was by virtue of the assignment of the United States Cashier Company that the International Company got the patent.

The witness had stated a list of all the applications that had been filed, either on behalf of the United States Cashier Company, or assigned to the United States Cashier Company, and all patents that had been either issued to the United States Cashier Company, or issued to anyone else and assigned to the United States Cashier Company, from the year 1908 to December 31, 1914. These patents were as follows: The first patent was the Potter patent, issued April 28, 1908, and assigned by mesne assignments to the United States Cashier Company, recorded April 12, 1912. A certified copy of the letters patent was received in evidence, exhibit 343. The witness then described the objects of the invention.

The next patent was issued to Thomas Bilyeu, December 31, 1912, and was a design for the casing for coin-handling machines. And witness testi-

fied that there were other applications and other patents that were issued to others, like Thomas Bilyeu, and assigned direct to the International Money Machine Company; that there were eighteen applications and patents together that were either issued to Mr. Bilyeu or to Mr. Overlin and assigned, or other persons in the United States Cashier Company, and assigned to the International Company: that of these eighteen applications there had been six patents issued and the other twelve applications were pending; that there were four where title never went through the United States Cashier Company, but assignment was made to the International Money Machine Company. One of these patents was dated October 20, 1914; another was issued February 28, 1911, assigned by Overlin to Bilyeu, and by Bilyeu to the International Company; another was application by Thomas Bilyeu, filed April 14, 1910, assigned to the International Money Machine Company; another was application filed March 27, 1911, by Bilyeu and Overlin, assigned by Overlin to Bilyeu, and by Bilyeu to the International Company, and the latter had been allowed by the examiner but not yet patented. Another was application filed September 24, 1909, which was forfeited, and was afterwards passed to issue and patented September 14, 1914, to Thomas Bilyeu.

The witness was then asked the following question: "Now, you have said in your examination yesterday that when an application is filed in the

patent office, and the examiner has made his search and finds something in conflict, or apparently in conflict, that those claims are cited and notice given to the applicant that certain claims are cited against him. Now, can you give to the jury the number of the prior patents that were cited against this Bilyeu Cashier?"

The witness answered: "Yes, I have a note of that. Fifteen patents cited during the prosecution of this application."

And the witness testified that one of the citations was a patent issued to a man by the name of Lindeloff, Patent No. 619,321, dated February 14, 1899.

Whereupon the district attorney asked the witness the following question: "Are you able to say from the examination, as an expert in the science of patent law, whether or not the Lindeloff patent dominates the Bilyeu Cashier?"

To which question the defendants' counsel objected, on the following grounds: "We object to going into it to show whether or not some prior patent they did cite, upon which the department has issued a patent, if anything conflicts with that. If it were so, it wouldn't have anything to do with this case, and then the court and this jury can't try that out here, it seems to me. This is something that took place in the patent office. These defendants made their application."

The counsel for the defendants asked the witness this question: "The department cites this

previous machine, doesn't it?" And the witness answered: "Yes."

After argument of counsel, the court ruled upon the objection as follows: "The controlling question in this case is one of good faith, and the Government charges that these people were not engaged in a legitimate enterprise, but were using it for the purpose of defrauding the public. Now then, if they had these patents, or pretended to have them, knowing at the time that they were not what they were representing them to be, and based upon that, insisted and represented that their stock was of a certain value, and was increasing in value all the time, and that they proposed to go ahead and manufacture these machines, it would come within the terms of this indictment, and would be a question that I think the jury have a right to consider, in determining whether they were acting in good faith in this transaction. If they were, then of course that is the end of the case. If not, and they come within the provisions of the indictment, and sustained by the testimony, they would be guilty of the charge against them. Therefore, I think the Government has the right to show that, notwithstanding these people had patents, if they knew at the time that their patents were invalid, and would not permit them to manufacture these machines, it is a circumstance going to determine whether they were acting in good faith, or not. It does not go to the validity of the patents. We are not trying that question. It goes to the good faith of the defend-

ants, and for that reason I think the testimony is competent."

And so the court overruled the objection and permitted the witness to answer, in which ruling the court erred.

V.

The court erred in admitting the following testimony:

Under the said ruling of the court the witness testified that the Lindeloff patent was issued February 14, 1899, which was cited against the Bilyeu patent, and the witness said he had read the claim of the Lindeloff patent in connection with the machine shown and described in the Bilyeu patent, No. 1,114,574, and in his judgment the construction shown and described was within Claims 1 and 2 of the Lindeloff patent.

And the district attorney asked the following question: "What would you say as a patent expert as to whether or not the claims numbered 1 and 2 of the Lindeloff as allowed, dominate and control these claims in the Bilyeu Cashier?"

And the witness answered: "These claims as allowed dominate the construction shown in the Bilyeu Cashier."

And in like manner the witness testified about Patent No. 885,136, patented February 28, 1911, to Thomas Bilyeu and W. S. Overlin, and assigned direct to the International Money Machine Company. That the purpose of this machine was the

same as that of the patent to Bilyeu hereinbefore last recited, No. 1,114,574, and the witness testified that the Lindeloff patent was cited against that application, and that as an expert in his judgment the claims of the Lindeloff patent dominated this patent in the same way that they did the patent previously spoken of, the original patent.

And the witness was permitted further to testify, in substance, in response to questions by counsel for defendants, that the witness referred to the patent in speaking about citing; that they generally made a positive rejection in view of that as meeting it, as anticipating the claims; they reject the claim to which that patent applies; that in the prosecution of an application through the patent office the solicitor and examiner give information back and forth until they finally get exactly what is thought to be patentable by the patent office; that the patent office delivers a written opinion to the applicant, that he is not entitled to a patent because there has been another patent prior to that already issued, but that when they do not reject it, but issue a patent they do not tell him that, they simply cite the art, cite the patent; that the department did not express any opinion regarding the infringement, and that the witness did not express any opinion when that particular patent was issued, not as dominating, simply anticipating.

And thereupon, in view of the evidence, counsel for defendants moved to have the evidence stricken out.

And being further examined by the district attorney, the witness testified that a letter of rejection is written in which the patent is identified and the applicant is told that his claim is rejected in view of that patent, in anticipation, but that when it was not rejected, if it was not to be rejected on that patent, that patent would not be cited except in a friendly way perhaps, to show what the prior art was.

And in response to questions by the defendants' counsel, the witness stated that he believed in his judgment claims 1 and 2 of the Lindeloff cover the construction disclosed by the Bilyeu machine; that that was witness' opinion after examination; that nobody in the patent office gave an opinion to Mr. Bilyeu about the dominating control referred to.

Whereupon counsel for the defendants said: "I think I am entitled to have that out, for it didn't go to Mr. Bilyeu."

The court then said: "I understand they notified him of this prior patent."

Counsel for defendants: "They didn't notify him of the witness' opinion as an expert, because it was not their duty to give him that information."

The Court: "That is clear, but they did notify him of the patent, of the prior patent."

Counsel for defendants: "Yes, they cited the patent."

The Court: "And advised him of that, so he knew there was such a patent, and he took his own chances with reference to disposition."

Counsel for defendants: "I suppose, for his information about that, but he didn't have the benefit of this witness' opinion that the jury has."

The Court: "No, goes to the question of his good faith."

And the court overruled the motion to strike out the testimony, and in so ruling committed error, which is exception "E;" and the witness testified that there were thirteen patents cited in the Bilyeu patent, issued prior to that time, including the Lindeloff.

VI.

The court erred in admitting the following testimony:

The witness testified further about Application 555,552, filed April 14, 1910, by Bilyeu, Overlin and Gridley, and still pending; that the assignment was made to the International Money Machine Company; that it was an invention to cover another machine of the Bilyeu Cashier type. After describing the invention, witness testified that there were ten patents cited against that.

Witness further, under the ruling of the court, testified about Patent No. 617,201, which was forfeited and renewed under Serial No. 30,673, and was allowed on June 1, 1915, but had not yet been patented. An assignment of this case was made to the International Money Machine Company by the applicants, none to the United States Cashier Company. The purpose of this invention was to print

a record of the amount of money delivered by the machine, and, after describing the machine, the witness testified that there were eleven patents cited against this patent.

The witness then testified about Application No. 638,434, filed by W. S. Overlin, assigned to the United States Cashier Company, and by mense assignments to the International Money Machine Company. The filing was November 3, 1911. This was a machine for delivering paper currency. After describing the machine, the witness testified that there were nine patents cited against this patent. One was a patent that had been issued to a man by the name of Cook. The Cook patent was No. 807,724, dated December 19, 1905, and in the witness' judgment claim 63 of the Cook patent includes the drum structure disclosed in this application, and dominates it.

The witness then testified about Application No. 702,164, filed June 7, 1912, the Bank Cashier.

At this point it was admitted that the negative in the indictment as to the ownership of the patents by the company did not include the bank cashier, that it had been left out of the indictment inadvertently.

Thereupon the counsel for the defendants objected to evidence concerning the Bank Cashier, on the grounds stated in the following statement to the court: "Now, that brings up a question, a good, clean-cut question for Your Honor to decide, whether or not it is sufficient in an indictment,

any more than it is in a suit in equity, to charge a representaton as being false. If I understand the rule of pleadings applicable to civil as well as criminal cases, when you allege a false and fraudulent representation, you haven't gone far enough by applying to it that epitaph of fraud vitpuerative. What you have to do, as I understand, in a civil or criminal case, when you are depending upon false representations, is to state in what particular it is false; a false representation may not be fraudulent, and the mere designation of it by that adjective is not sufficient."

Whereupon, after argument of the district attorney, the court ruled as follows: "I think there is a reason why this testimony is competent, and that is, it has been shown in evidence that this company advertised at a certain time that they had patents to these certain named machines, they owned the patents to certain named machines. The evidence up to this time shows that they didn't have patents to some of these machines they were then advertising. Now, that was either an intentional misstatement, or it was an error of judgment and misinformation, and that becomes an important question, I suppose; it will be before this trial is through, for some triers of fact to determine in arriving at that question. I think the Government is entitled, in a case of this kind, where it depends on circumstances, to put in evidence other acts of a similar kind, transactions of a similar kind that happened at the same time. And when they ad-

vertised these machines the Government alleges they didn't have, they advertised another machine they didn't have at the same time, and it is for the Government to show the purpose and intent for which they advertised the machine, and for that reason I think it is competent. But I don't think for the purpose of showing that was one of the means by which the defendants intended to carry out that conspiracy. I think the Government is required in an indictment of this kind to negative those allegations, but it simply goes to the intent or purpose of the defendants."

And counsel for the defendants, further stating his objection, said: "I will have the record show that, the part of it I am sure about is that the indictment, in effect and legal substance, alleges by admitting that that machine was patented, and that no issue is raised between the indictment and the plea of not guilty on that question."

And the court overruled the defendants' objection, to which an exception was taken, which is exception "F."

VII.

The court erred in admitting the following testimony:

The witness, under said ruling, further testified about Application No. 702,164, filed by Nelson White, W. S. Overlin and F. A. Bullington, filed June 7, 1912. The title of the invention was a Mechanical Cashier, Adding and Listing Machine. The patent had not yet been granted. This was

assigned to the United States Cashier Company, and afterwards to the International Money Machine Company by the Cashier Company. The machine comprised an adding machine with printing attachment to print the amount separately and to take totals. After describing the machine, the witness testified that there were twenty-four American patents, and two German and two English patents cited by the examiner against that machine, and that that patent had been placed in interference by Nelson C. Oviatt, on September 29, 1914. There had been one hundred and forty-seven claims made in the application, and of these claims three were made counts in the issue of interference, and disregarding these leaves one hundred and forty-four, of which twenty have been allowed and one hundred and twenty-four rejected.

The witness then testified about Application 710,512, filed by W. S. Overlin, for Money Paying, Changing and Listing Machine, filed July 19, 1912. This was the machine called the Computing Machine, and the same machine that had been identified by the witness Overlin upon the stand as the Computing Machine which he had built. No patent had been granted. This had been assigned by Overlin to the United States Cashier Company, and by the Cashier Company to the International Money Machine Company. The purpose of the invention was to deliver coins of a value equal to the difference between an amount tendered and an amount to be deducted from it. After describing the ma-

chine, the witness testified that there were twenty-one United States patents cited against that machine, and three English patents and two German patents. That there were two patents to a man named Osborne cited against the patent, Osborne patent No. 864,185, dated August 27, 1907, and Osborne patent No. 982,853, dated January 31, 1911. The witness said he had examined the Osborne patent carefully; that it had been issued to the National Cash Register Company, Dayton, Ohio, as the assignee from Osborne, the inventor. There were one hundred and fifteen claims in the Osborne patent.

Whereupon the district attorney asked the witness the following question: "Now, I wish you would make a comparison and show to the jury, I would like to have you do it carefully and in detail, whether or not this Osborne patent dominates and controls this change computing machine, and if it does so, in what manner it does it, and what claims there are in the Osborne patent that do it."

And the witness then testified, in answer to said question, that he found several which, in his judgment, included the construction of the machine shown here as the computing machine. The witness noted claim 18 of the Osborne patent and read it: "Claim 18. In a change maker, the combination with a movable element, of means for actuating the same, according to the amount of the purchase, means for further actuating the same according to the amount received to bring it to a posi-

tion representing the difference between the two amounts, and a money changer controlled by said movable element." The witness then read claim 47 of the Osborne patent, and claim 100 and claim 101, and then testified that the claims in the Osborne patent were fundamental and basic, and that in the judgment of the witness it would be extremely difficult for anyone to evade that patent, that the only way he could escape it would be to invalidate it. The witness testified that the Osborne patent was pending for sixteen years, and was finally passed upon and patent issued on August 27, 1907, and the life of the patent would be seventeen years from the date of that issue.

All of the foregoing testimony was taken and received over the objection of the defendants that it was not competent on the question of good faith, or for any other purpose, to prove that the patents or applications involved could be affected by citations of a prior patent, and an exception was allowed, which is exception "G."

VIII.

The court erred in admitting the following testimony:

The witness testified about Application No. 728,853, filed by W. S. Overlin, for money deliveries on street cars, filed complete October 13, 1912, patented July 6, 1915, Patent No. 1,145,700. That machine is known as the Lightning Change Maker. This was assigned by Overlin to the United States

Cashier Company, and by them to the International Money Machine Company. The machine differs primarily from the Bilyeu Cashier in that there is no handle here for operating and discharging. After describing the machine, the witness testified that through his reading of the Lindeloff patent he was led to believe that the first claim of Lindeloff includes the construction of this machine. That this patent was to issue to the International Money Machine Company, and was issued July 6, 1915, in the natural course.

This testimony was taken subject to the same objection and the same exception, which is exception "H."

IX.

The court erred in admitting the following testimony:

The witness testified about Application No. 729,093, filed by Robert L. Bailey, for a Change Making and Computing Machine, filed November 1, 1912. This was assigned by Bailey to the United States Cashier Company, and by them to the International Money Machine Company. The application was still pending, no patent having been granted. The purpose of the invention was to deliver the difference between an amount tendered and an amount to be deducted therefrom, similar in purpose to that of the Overlin computing machine, which had been theretofore referred to.

The witness was asked the following question: "Now, what have you to say as to your opinion in

regard to this patent being dominated by the Osborne patent, whether or not this is the same as the other computing machine, and to the same degree?"

The witness answered: "The machine shown in this application is within the claims of the Osborne patent which were formerly referred to, and dominated by it."

This evidence was taken over the objection and exception of the defendants, and is exception "I."

X.

The court erred in admitting the following testimony:

The witness testified that there was a patent, No. 737,958, issued September 1, 1903, to one Pfeifer, which was cited against the Bailey patent, and the witness said that he had examined the Pfeifer patent, and, in response to questions, stated that the Pfeifer patent was issued to Mast, Foss & Company of Springfield, Ohio, and that eighteen claims of that patent, in witness' judgment, included the construction of the Bailey machine as already shown.

This evidence was taken over the defendants' objection and exception, which is exception "J."

XI.

The court erred in admitting the following testimony:

The witness testified as to Application No. 729,704, for Currency Paying and Computing Machine,

filed by W. S. Overlin, November 5, 1912, for a Mechanical Cashier, that being the official title. This was assigned to the United States Cashier Company, and by the Cashier Company to the International Money Machine Company, and no patent had yet been granted. It was an application for a machine designed to deliver either paper currency or coin, at the wish of the operator, one of those, a paper currency delivery machine, having been referred to hitherto. And after describing one machine, he testified that there were twenty-one patents cited against the application, three of which were German.

This evidence was admitted over the objection and exception of the defendants, which is exception "K."

XII.

The court erred in admitting the following testimony:

The next application was No. 742,958, which the witness testified was an application by Thomas Bilyeu, filed January 18, 1913, the title being Paper Money Deliveries; that a patent had not yet been granted. This was assigned to United States Cashier Company, and by the Cashier Company to the International Money Machine Company. The purpose of this was to deliver paper money. The witness described the machine, which is similar to the description of a similar machine before given, and he testified that, in his opinion, the application for a currency payer, filed January 18, 1913, by Mr.

Bilyeu, contained rather broad claims that had already been allowed.

This evidence was taken over the objection of the defendants, and the exception, which is exception "L."

XIII.

The court erred in admitting the following testimony:

The witness testified about Application No. 755,817, filed by Nelson White, March 20, 1913, for Adding and Listing Machine, no patent yet issued. This was assigned to the United States Cashier Company, and by it to the International Money Machine Company. This was an improvement in adding machine, and did not, of course, claim to be broadly new because the adding machine art is pretty old and the basic patents have expired. There were twelve claims allowed on this application, and fourteen objected to as not being clear enough to be understood so that the examiner could take definite action upon them, and twenty-two were rejected. There was an amendment filed since that time on the application, but not yet acted on. The amendment was dated May 25, 1915, and its standing at the time of the trial was that it was awaiting action on the part of the patent office. Against this patent the witness testified that there were ten patents cited, one English, one German, and the other United States; that the patents cited were Burrough and Pike.

This evidence was taken over the objection and exception of the defendants, which is exception "M."

XIV.

The court erred in admitting the following testimony:

The witness testified concerning Application No. 767,335, filed by Thomas Bilyeu, May 13, 1913, for Paper Currency Paying Machine; no patent yet allowed. This was assigned to the United States Cashier Company, and by it to the International Money Machine Company. The purpose of this was to deliver paper currency in a flat condition, and was a further advance in that particular art. The witness testified that the claims allowed in that application were, he considered, broad. There were eight prior patents cited against that application during the consideration of that patent.

This evidence was taken over the same objection and exception, and is exception "N."

XV.

The court erred in admitting the following testimony:

The witness testified concerning Application No. 836,771, which was an application filed by Nelson White, May 6, 1914, for Ribbon Feeding Machine. This was assigned to the United States Cashier Company, and by the United States Cashier Company to the International Money Machine Company; that no patent has yet been granted on this

application, the last action having been a rejection, and no amendment yet entered in the files. This was an improved mechanism for feeding and inking ribbon used in adding machines, typewriters, and other machines. The witness described the invention. There were ten claims in the application, of which three specific ones had been allowed, and the other seven rejected, and the witness testified that there were seven prior patents cited against this application.

This evidence was taken over the same objection and exception, which is exception "O."

XVI.

The court erred in admitting the following testimony:

The witness testified concerning Application No. 838,065, filed by Nelson White, May 12, 1914, for a Coin Delivery Machine; no patent yet issued on the application. This was assigned to the United States Cashier Company, and by them to the International Money Machine Company. This was a machine designed for the same purpose as the so-called Lightning Change Maker. It was a complete reorganization, different organization. It was broadly to select and discharge coins by the depression of a key. After describing the invention, the witness testified that there had been eleven prior patents cited by the patent office in relation to this application.

This evidence was taken over the same objection and exception, which is Exception "P."

XVII.

The court erred in giving the following instruction :

“It has been truly said in argument that one of the cardinal points in this case is the intent of the defendants. But what intent? Was it their intent that they could make the business of the United States Cashier Company a success? Was it their belief that they could make the enterprise of the United States Cashier Company successful? The answer to these questions would necessarily be No. If they agreed to make false and fraudulent pretenses, representations or promises; if they agreed to make false and fraudulent representations and assurances, for the purpose of deceiving the investors and the public in respect to the true condition of affairs of the corporation, or the value of its stock, then the ultimate intent to make the business of the corporation a success, or the ultimate belief of the defendants that they could finally make it a success, would by no means furnish any condonation or legal excuse for the false and fraudulent representations, which they would under the circumstances agree to make in order to induce the investors and the public to pay over their money.”

This instruction was given over the objection and exception of defendants, which is Exception “Q.”

XVIII.

The court erred in giving the following instruction :

“In considering this question, the question of and concerning the intent to defraud, you must direct your attention to the intent presented by the particular transaction set out in the indictment. If these defendants agreed that they would put forth the false representations or promises alleged, for the purpose of deceiving and misleading investors and the public into paying over their money, then it matters not how confident they may have been that they would be able to make the business or the corporation a success, or how confident they may have been that they would be able to return that money without loss, or with profit, because the representations which they would have agreed to make would be made for the purpose of getting the money in a wrongful manner, and they could not, under such circumstances, make them rightful by pointing to some ultimate good intent.”

This instruction was given over the objection and exception of defendants, which is Exception “R.”

XIX.

The court erred in giving the following instruction:

“The parallel between such a case as I have presented and the crime of embezzlement is very close. It is a well-known fact that nearly every man who embezzles money expects that he will be able to pay it back without loss; but his taking is wrongful, and his intent to pay it back without loss cannot cancel the wrong. And so in this case, if

the defendants, by means of the false and fraudulent representations set out in the indictment, agreed to mislead investors and the public generally into paying over to them or to the Cashier Company their money and their property, then their belief that they could ultimately return that money without loss and with profit would not condone the wrong in getting the money by deception."

This instruction was given over the objection and exception of the defendants, which is Exception "S."

ARGUMENT.

Assignments I, II and III may be considered together. Bear in mind that the particular issue before the court at the time this evidence was offered and admitted was whether or not the representations made by the defendants of the ownership of the patents was a fraudulent representation. The particular machine in the controversy was the bank cashier described in the indictment, the ownership of the patent to which the indictment did not negative. Nelson C. Oviatt was called as a witness. He was the president of the Payograph Company, which was engaged in the manufacture of the Payograph in New Haven, Connecticut. He said he was acquainted with Thomas Bilyeu in the summer of 1909, at Portland, Oregon; that he devised the principle of a coin-paying machine in 1909, and had gone to Mr. Glover, a public engineer, with a view of having him develop it for the witness, but he was unable to do so, and he

presented it to Mr. Bilyeu; that Mr. Bilyeu took it under consideration, and after two days of deliberation said he would take it on, with the understanding that he would have forty per cent of the results and the witness was to have the other sixty per cent of the results, and the witness was to turn over to Bilyeu his ideas and Bilyeu was to proceed with the development and put it into working shape and build a model. This evidence, besides being recited in the first assignment, is found on pages 170 *et seq.* of the Transcript of Record.

At the end of the testimony just recited counsel for the defendants asked the district attorney: "May I ask what the purpose of this evidence is?" and the district attorney answered to the court and jury: "The purpose of this evidence is to show that back in 1909, witness, Mr. Oviatt, was working upon a coin-paying machine, and that he made a full and complete disclosure to the defendant Bilyeu; and we are going to then proceed to follow the making of the machine known as the Payograph, and the knowledge of the Payograph as it was brought home to the defendants, the attempted sale of a similar machine by the defendants in England, and their knowledge of the Payograph applications pending there; conversations had between Bilyeu and Menefee and LeMonn with this witness; bring these transactions down to the date where LeMonn made an investigation of the Payograph machines personally, and sent the telegram here that has been introduced in evidence."

Thereupon counsel for the defendants asked: "For the purpose of showing that the Bilyeu patent is not good?" To which the district attorney answered: "I don't know whether it will go that far or not, but it will go to the extent of showing the knowledge of the defendants of the work that Mr. Oviatt was doing."

Thereupon counsel for the defendants interposed an objection to said evidence, and as the objection was accompanied with an argument upon the question made to the court, we will at this place recite that argument as it was made to the court, and make it a part of the argument in this brief. The counsel said (Transcript, pp. 171-172):

"Now, Your Honor, I think I will interpose an objection upon that statement of counsel. The allegation in this indictment is that there were representations made that the defendants, the Cashier Company, had certain patents. It did have a patent, which it got from its predecessors, and there is a record of the company, which is called the Bilyeu patent. Now, in this case, I take it that this court has no jurisdiction to try out the question between Mr. Oviatt on the one side, and Mr. Bilyeu on the other, as to who is entitled to that patent. That has been determined by the department, and if there is an infringement or a conflict between Mr. Oviatt and this defendant, that is a matter to be settled by a court having jurisdiction to try it, and it doesn't seem to me that collaterally, in this case, the Government can attack a patent upon an allegation that

we didn't have it. If we have got it, and had it, it was a true representation; whether it is good, or conflicts with somebody else's patent, or Mr. Oviatt's, would depend, of course, upon the decision of the court in a suit brought for that purpose. For the purpose for which this evidence is offered, I make the objection. If it is admissible on any other grounds, of course the counsel could state it, but upon the ground of showing that Mr. Oviatt and not Mr. Bilyeu is entitled to the benefit of that patent, and that Mr. Oviatt and not this company, is entitled to the benefit of the patent, which the company has got, we think that would be submitting to the jury a question that they ought not to have to try, because it might very well be said that, upon the evidence adduced in this case collaterally, if counsel is right in his contention, the jury might find that Mr. Oviatt had the better right; I don't think they would, but they might, if it is competent for the evidence to be introduced; and yet upon a trial between them in a court having jurisdiction, it might be determined that Mr. Oviatt didn't have the better right; so you might have a decree in a criminal case, or a judgment in a criminal case, deciding against the defendant upon that issue collaterally; and it seems to me that ought not to be submitted to the jury, at least for that purpose."

Thereupon the district attorney replied: "Of course, Your Honor will remember that at the beginning of the Government's case, we introduced in evidence a contract entered into between the American Cash Record Company, on the one part, and the

United States Cashier Company, upon the other, by the terms of which certain patent rights alleged to be the property of the American Cash Record Company were sold to the United States Cashier Company. Now, one of the allegations in the indictment is that the stock in this company was worthless, and that these defendants knew it to be worthless. Now, anything that the Government could introduce that would tend to prove that this company, the United States Cashier Company, knew that what was being offered for sale had no value, would tend to sustain the allegation of the Government's complaint, that its stock was worthless. If the Government were able to prove that the United States Cashier Company was demonstrating machines, even for which they may have owned a nominal patent, when one of the defendants *knew of the great and grave danger that the company would experience whenever they proceeded to market or sell that machine*, why, it seems to me that would be one element of fraud, and would go to substantiate the charge in the indictment that the stock of the United States Cashier Company was not of the value that it was represented to be by the defendants."

Thereupon the counsel for defendants asked the following question of Mr. Reames: "May I ask a question, Mr. Reames? Is this particular patent the one that you do not negative in the indictment?" And Mr. Reames answered: "Yes, the one that is not negatived in the indictment."

Thereupon the counsel for the defense made another objection, in this language: "Then there is another question that occurred in the early part of this case. The allegation is that the defendants represented that they had patents on all of these machines, whereas, in truth and in fact, the indictment says they had patents only on one. That is to say, that particular patent is not negatived, and that being so, I take it that that is an admission, and not a matter in issue in this case, as to the existence and of course the validity of that patent. I take it that in an indictment, as in any other pleading, it is not sufficient to say that the representation is false, but it must be further shown by explicit allegation, in what respect it is false. Now, when it is said it was a false representation, in this indictment, that all these machines were patented, whereas in truth and in fact, the truth was that one of them was patented, or at least that there was no misrepresentation as to this particular machine, I take it that that is not in issue, but that it is to be taken as true in this case, not subject to be determined by the court or jury, but admitted by the indictment that this patent was truly represented, and therefore it cannot be a false representation, and no evidence can be introduced that has the slightest tendency to show that this patent was not a perfectly good patent, because it was the duty of the indictment, of the district attorney in drawing the indictment, if he meant to,

to tender to the defendants an issue upon that, to notify us by making a proper allegation.”

Whereupon the court ruled upon the objection in the following language: “I think in view of the indictment, that it must be conceded, for the purpose of this trial, if there was a patent, that the company had a patent to this particular machine. Further than that, I don’t suppose in this trial that the validity of the patent that has been issued by the Government can be tried or determined. There is evidence in this case tending to show that LeMonn made a visit East along in 1912, and learned of this particular instrument, and that it was being manufactured, and that he sent certain letters and certain telegrams to Mr. Menefee with reference to this matter, and advised a certain course of procedure, which the evidence shows the company subsequently took, and for that purpose. I think this testimony of their connection with this patent is material in this case, *to show their good faith.*”

Thereupon counsel for the defendants said: “I am content with this limitation, that these two matters will be instructed to the jury that the patent is not in controversy.” And the court said: “In this case I understand it is admitted in the indictment.”

The evidence referred to in the court’s ruling is found on page 176, Transcript of Record, and is to the effect that the defendant LeMonn had made a visit East in the early part of 1912, and learned of

the manufacture of this particular instrument, and that he sent letters and telegrams to the defendant Menefee with reference to the matter, which letters and telegrams described said machine, stating that he, LeMonn, believed it to be a winner and advised the defendant Menefee to not sell any more of the capital stock of the company until the private stock of the defendants Menefee, LeMonn and Campbell had first been disposed of; that subsequent to the receipt of the said telegram the defendants Menefee and Campbell, at Portland, Oregon, caused the board of directors of the United States Cashier Company to pass a resolution withdrawing all of the company's stock from the market and authorizing the defendants Menefee, LeMonn and Campbell to sell their own personal stock with the sales organization or sales force and the demonstration machines of the company, and that was the certain course of procedure referred to in the court's statement.

There was evidence tending to show that the information concerning the above instrument in the said letters and telegrams had no connection with the advice by LeMonn not to sell any more of the capital stock until the private stock of the defendants Menefee, LeMonn and Campbell had first been disposed of, and that the resolution withdrawing the company's stock from the market was not on account of any information they had in respect to the said particular instrument.

The court allowed an exception, which is exception "A," page 177, Transcript of Record, to the admission of the said evidence upon the good faith of the defendants.

Two distinct questions arise on this ruling, as there were two objections. We will consider them separately. The first criticism is that the witness was allowed to testify that in 1909 he had an understanding with Bilyeu, the defendant who was discharged by the court, that he was to turn over his ideas to Bilyeu and Bilyeu was to proceed with the development and put it into working shape and build a model. The district attorney's statement of the purpose of this evidence shows that it was his object to show to the jury that these defendants knew of the great and grave danger that the company would experience whenever they proceeded to market and sell their own machine, to which they had a patent, because in 1909 Mr. Bilyeu, the inventor from whom the Cashier Company got the patent, had a controversy with Mr. Oviatt, and claimed, in effect, that he, Oviatt, was the inventor, and that Bilyeu had appropriated his invention and got the patent for himself. Under no theory can we conceive how this evidence was material. The representation relied upon, and which the Government was attempting to prove was false and fraudulent, was that the defendants' company owned a patent to the bank cashier. So far as the indictment discloses, it did have such a patent. The effect of the evidence relied on, according to

the district attorney's statement, was to show that the value of that patent, which the company owned and which was a part of its assets, was affected by the previous controversy and claim of Mr. Oviatt. It was to allow the jury to find from that evidence, not that the representation made as to the bank cashier was false or fraudulent, but that, being true, nevertheless the defendants would be guilty of bad faith and could be convicted upon this particular charge, notwithstanding the truth of the representation. And this bad faith, according to the ruling of the court and the argument of counsel, would arise from the fact that they sold stock in the corporation based upon a representation that turned out to be true, because for another reason not disclosed in the indictment, to-wit: the Oviatt controversy, the patentee would be subject to a law suit with Mr. Oviatt.

In considering this question we desire to have the court consider this particular representation as to the ownership of the patent to the bank cashier as if it were the only one described in the indictment. We do that for the reason, as will subsequently appear, that the court left the jury to find the defendants guilty upon finding that any one of the representations was false and fraudulent. In short, as the matter was presented to the jury, they might find for the defendants upon every other issue and yet find them guilty because the defendants knowingly procured a patent which was subject to Oviatt's successful attack. Upon this

point the contention that we make squarely is that the evidence did not relate remotely to the issues in the case, and had nothing to do with the alleged misrepresentation concerning this particular patent alleged in the indictment.

What was the issue with reference to the bank cashier patent? There was none. The representation charged was that the United States Cashier Company owned the patent to that machine. This representation is not negatived. It is therefore true. The department had decided that the patentee was entitled to the protection, rights and privileges granted by the patent law. It is *prima facie* valid even in a suit for infringement. In such a suit even Mr. Oviatt would have to overcome this presumption by allegations and proof showing a better right. But by the court's ruling the Government is permitted, without any allegations whatever and collaterally to prove that Mr. Oviatt "had devised the principles of a coin-paying machine," and that "he presented it to Mr. Bilyeu," and that Mr. Bilyeu "took it under consideration," and finally that they came to an "understanding that he (Bilyeu) would have forty per cent of the results and the witness the other sixty per cent of the results"; that the witness was "to turn over his ideas to Bilyeu" and Bilyeu was "to proceed with the development and put it into working shape and build a model"; that finally defendant Bilyeu took witness to Overlin to manufacture a model, and "the model was constructed," and then "a month or six

weeks after that time Mr. Bilyeu said to witness one day that he had been thinking the matter over for a week past and had decided that witness *did not own anything in the device*, and that he had applied for a patent *in his own name.*”

Now, what was all this evidence for if not to have the jury understand and find that Bilyeu had stolen Oviatt’s ideas, and got a patent in his own name for Oviatt’s ideas, with the necessary inference that the Cashier Company had a patent to the bank cashier to which Oviatt had a better right? And if there were any doubt of the object and the effect claimed for the evidence, it is made clear by the district attorney’s statement, as follows: “If the Government were able to prove that the United States Cashier Company was demonstrating a machine, even for which they may have owned a nominal patent, when one of the defendants knew of the *great and grave danger* that the company would experience whenever they proceeded to market or sell that machine.” The defendants have had no notice by any allegation that the validity, value or protection of the bank cashier patent was to be attacked. There was no misrepresentation concerning this patent.

But the district attorney argued that the evidence was admissible in support of the allegation that the stock was worthless. “Now anything,” he said, “that the Government could introduce that would tend to prove that the company knew that what was being offered for sale had no value,

would tend to sustain the allegations of the Government's complaint that its stock was worthless." And the court seemed to take that view, and allowed the evidence upon that statement of its purpose. But that will not do. The allegations of the indictment as to the worthlessness of the stock are all based upon the falsity of the representations of the actual conditions of the company. The indictment did not content itself with alleging that the stock was worthless, but proceeded to show why it was worthless. The representation respecting the patents was (Indictment, page 13, Transcript of Record, bottom of page): The defendants "did represent, pretend and promise that the said corporation, etc., owned the patents to a certain change computing machine, a certain bank cashier machine, a certain lightning change maker, a certain currency paying machine, and a certain new-style adding machine, and that the said corporation, namely, United States Cashier Company, was engaged in the business of manufacturing and selling said machines, and each and every and all thereof. *That on account of said alleged ownership of said patents, etc.,* the said shares of stock of said corporation, namely, United States Cashier Company, were of great commercial value, and that large dividends would be by said corporation declared and paid thereon to the said investors, etc." That said company "would declare and pay to all of said investors, etc., large and certain dividends upon said stock within six months from the date when any of said

persons would purchase any of said shares of stock from the said defendants." And the negative (page 16, Transcript of Record), declared that neither the corporation nor the defendants owned the patents to four of the machines, omitting the bank cashier patent, and then proceeds to negative the business of manufacturing and selling the machines, and declared (page 17) that the shares of stock, "as the defendants well knew, were of very little value, and of practically no value whatsoever, and said shares of stock, and each and every and all thereof, were practically worthless." And as to the other allegations of misrepresentations, the same may be said. For instance, the representation that the company was "the owner of and in possession of large bona fide orders for the purchase of said machines, and that *on account of said orders*, etc., would make a large and certain profit" (page 14, Transcript of Record). And the same is true of the other misrepresentations. And there is no allegation in the indictment that the stock was worthless or was not worth what it was represented to be, on account of the fact that a patent which the company owned was injuriously affected in its value by a prior claim of Mr. Oviatt, or anybody else. This evidence introduces a new element of supposed fraud in dealing with this patent, not hinted at in the indictment. Now, the Oviatt claim could not be shown in any case, civil or criminal, against the *presumption* of the patent, without appropriate allegations. That patent is good in all

its extent against the world in the absence of allegations overcoming its prima facie effect; that is, a pleading is required to overcome the presumption of law in favor of the patent. If this is so in a direct proceeding against the patentee, by so much the more is it so in a collateral attack, and still more in a criminal case, where the presumption of innocence also must be overcome.

But the evidence admitted was incompetent for another reason. Concede, for the sake of argument, that it would be competent without allegations in this case to prove that Oviatt had a claim to the patent; it would still have to be a valid claim to affect the defendants. None of them, nor the company, were parties to the Oviatt-Bilyeu transaction. That was in August, 1909, more than a year before the conspiracy charged, and before the defendants' company bought the patent rights from Bilyeu. The defendants are sought to be affected by the Oviatt-Bilyeu transaction solely because afterwards, in selling the stock of the company, they knew of the Oviatt claim. They came into possession of this knowledge in 1912, through defendant LeMonn. The judge below, in ruling on the question, made this plain. After deciding that it must be conceded, for the purpose of this trial, if there was a patent, that the company had a patent to this particular machine, His Honor said: "There is evidence in this case tending to show that LeMonn made a visit East along in 1912 and *learned of this particular instrument*, and that it was being manufactured, and

that he sent certain letters and certain telegrams to Mr. Menefee with reference to this matter, and advised a certain course of procedure, which the evidence shows the company subsequently took, and for that purpose I think this testimony of *their connection* with this patent is material to show their good faith." That is to say, whether they were in good faith. Now, bad faith cannot be imputed to defendants in dealing with their own patent because they found out that Oviatt had a prior claim of any kind, without showing that the claim was in fact paramount, valid and dominant. Notice of a prior or outstanding claim or right is good if it is enough to put on inquiry, but the outstanding right must be *established as a fact* before bad faith can be imputed by notice. A party who should be sued for damages for misrepresenting that property he sold was free from incumbrances could not be made liable without showing that the representation was false, that is to say, that the incumbrance actually existed. It would not be sufficient to show that somebody claimed to have an incumbrance. But the court permitted the jury to find an imputation of bad faith on the part of the defendants because they had notice of a claim of Mr. Oviatt, which might or might not be a good claim. Such cannot be the law. A patent is property, and the owner of it, as the owner of any other property, may deal with it without being guilty of fraud merely because somebody else claims to own it or to have a better right to it. The right to deal with

property and dispose of it is property. That property cannot be destroyed in his hands by showing that somebody else claims it.

This all goes to the necessity of showing the untruth of the representation. The argument of the Government and the ruling of the court rest upon the proposition that the representation that the stock was valuable is false, in that a patent which they owned was subject to Oviatt's claim. If the representation that the stock was valuable is to be taken as equivalent to a representation that the patent was valuable and afforded full protection, then the negative of that would be that the patent was not good and did not afford full protection, because Mr. Oviatt had a better claim to it. To negative, therefore, the proof of the representation that the bank cashier patent was fully protected and good and not affected by any prior right, it would be necessary to show that that representation was not true, not merely that it might prove so.

Mr. Pomeroy, in 2 Pomeroy, Sec. 882 (1st Ed.), says:

“Untruth of statement: The statement of fact must be untrue, or else there is no misrepresentation. The entire doctrine of the law of equity concerning that species of fraud which consists in *suggestio falsi* is based upon the assumption that the representation is in fact untrue, as this very name itself shows. This is the premise of a fact which is assumed in every case which discloses the nature of fraud, and decides whether it does or does not exist

in a particular instance. This requisite element needs, therefore, no examination and no citation of special authorities. It is not susceptible of any exception or limitation."

Now, it was not pretended or claimed that Oviatt's claim was in fact good, but only that it menaced "a great and grave danger." Were the defendants obliged to quit selling the company's stock because they discovered that one of their patents was claimed by somebody else under a transaction that originated before they bought it, upon peril of being convicted of bad faith, and of having their action construed as a scheme and artifice to defraud?

The scheme or artifice denounced by Section 215 must be set out in the indictment under that section, and in the conspiracy to commit the crime it must be alleged that the object of the conspiracy was to do the things necessary to constitute the crime. This must be shown at least with certainty as to a common intent. The scheme or artifice described in this indictment included a purpose to represent that the defendants owned patents which they did not own. It did not include a purpose or a conspiracy to represent that they owned a patent which was affected and lessened in value as an asset by an adverse claim. The evidence objected to, therefore, is not within the description of the scheme or artifice, or within the objects of the conspiracy. The indictment, therefore, does not only not inform defendants of the charge involved in

the Oviatt evidence, but it misleads them, for by charging the representation as to the bank cashier patent and failing to show that it was false, it invites them to be unwary of an attack in that quarter. Of course, if it be necessary to sufficiently describe the artifice or scheme, then the evidence must conform to the allegations, and evidence not in support of the allegations is necessarily aside from the issue.

The Payograph and Mr. Oviatt cut great figures in this case. His evidence was extensive and, if believed by the jury, would cause them to think that Mr. Oviatt had really been swindled by Mr. Bilyeu, and that the defendants were his accomplices and successors in the fraud. His machine was demonstrated before the jury, and a comparison invited with the machine of the defendants, which was demonstrated. The demonstration before the jury of Mr. Oviatt's machine, as the Bill of Exceptions shows, was without the consent of these defendants. The evidence interpolated into the issue between the Government and the defendants an issue between them and Mr. Oviatt, and the argument of counsel and the language of the court might well cause the jury to believe that they were trying the question of the defendants' bad faith towards Mr. Oviatt. Besides, the evidence tended greatly to divert the jury from the real issue. It was extremely prejudicial in the case, and we confidently contend that it was error to admit it.

Except for some reference to the law involved in the foregoing argument, to be hereinafter made, this disposes of the first three assignments of error. The second and third assignments are only a further development of Mr. Oviatt's testimony, and are subject to the same arguments made in reference to the first assignment, already quoted.

The assignments from IV to XVI, inclusive, may be considered together, as they present the repetition of the same error a number of times.

Mr. Sewell was an employe of the patent office, of long service and large experience in patent matters. He was eminently qualified as a witness on that subject. He examined the records of the patent office with reference to the patents and applications of the United States Cashier Company and its assignors, and of the International Money Machine Company. His examination extended from January 1, 1909, to December 31, 1914. His testimony begins on page 288, Transcript of Record. He testified that the United States Cashier Company did not own a patent to an adding machine, and did not have an application for an adding machine on October 29, 1911 (that being about the dates of the publications of ownership by the company); that it did not have an application on file at that date for the lightning change maker; that a patent for the lightning change maker, one of the machines mentioned in the indictment, was issued July 6, 1915, and the number of the patent was 1,145,700; that there was no application for the change computing

machine by the United States Cashier Company on October 29, 1911, and the United States Cashier Company did not own any patent for any machine designed to do that work; that the United States Cashier Company did not own any patents to any machine which was designed to compute change for department stores and all classes of retail business, as described in the indictment; that on the 29th of October, 1911, the United States Cashier Company had no application on file for any machine that would do that work, and that from the 1st of January, 1909, until the 31st of December, 1914, the United States Cashier Company never did own patents to any of the machines described in the advertisement about which he had been asked. The witness testified that a patent which was issued on the 6th day of July, 1915, was assigned to the International Money Machine Company, and witness presumed it was issued to them; that it had been assigned by the United States Cashier Company; that the patent was based on application made by Overlin; that except for the assignment it would have been issued to the Cashier Company, and the district attorney admitted that it was by virtue of the assignment of the United States Cashier Company that the International Company got the patent. (Page 289, Transcript.)

The witness then gave a list of the applications that had been filed, either on behalf of the United States Cashier Company or assigned to the United States Cashier Company, and all patents that had

been either issued to the United States Cashier Company, or issued to anyone else and assigned to the United States Cashier Company, from the year 1908 to December 31, 1914. The first patent was the Potter patent, issued April 28, 1908, and assigned by mesne assignments to the United States Cashier Company, recorded April 12, 1912. A certified copy of this patent is Exhibit "343."

The next patent was issued to Thomas Bilyeu, December 31, 1912, and was for a casing for coin-handling machines. The witness testified that there were other applications and other patents that were issued to others, like Thomas Bilyeu, and assigned direct to the International Money Machine Company; that there were eighteen applications and patents together that were either issued to Mr. Bilyeu or to Mr. Overlin and assigned, or other persons in the United States Cashier Company, and assigned to the International Money Machine Company; that of the eighteen applications there had been six patents issued and the other twelve applications were pending; that there were four where title never went through the United States Cashier Company, but assignment was made to the International Money Machine Company. One of these patents was dated October 20, 1914; another was issued February 28, 1911, assigned by Overlin to Bilyeu, and by Bilyeu to the International Company; another was application by Thomas Bilyeu, filed April 14, 1910, assigned to the International Money Machine Company; another was application

filed March 27, 1911, by Bilyeu and Overlin, assigned by Overlin to Bilyeu, and by Bilyeu to the International Company, and the latter had been allowed by the examiner, but not yet patented. Another was application filed September 24, 1909, which was forfeited, and was afterwards passed to issue and patented September 14, 1914, to Thomas Bilyeu. Certified copies of all these applications and patents were introduced by the Government.

At this stage the witness was asked the following question: "Now, you have said in your examination yesterday that when an application is filed in the patent office, and the examiner has made his search, and finds something in conflict, or apparently in conflict, that those claims are cited and notice given to the applicant that certain claims are cited against him. Now, can you give to the jury the number of the prior patents that were cited against this Bilyeu cashier?"

The witness answered: "Yes, I have a note of that. Fifteen patents cited during the prosecution of this application."

And the witness testified that one of the citations was a patent issued to a man by the name of Lindeloff, No. 619,321, dated February 14, 1899.

Whereupon the district attorney asked the witness the following question: "Are you able to say from that examination, as an expert in the science of patent law, whether or not the Lindeloff patent dominates the Bilyeu cashier?"

This question was objected to on these grounds: "We object to going into it to show whether or not some prior patent they did cite, upon which the department has issued a patent, if anything conflicts with that. If it were so, it wouldn't have anything to do with this case, and then the court and this jury can't try that out here, it seems to me. This is something that took place in the patent office. These defendants made their application."

Counsel for the defendants then asked the witness this question: "The department cites this previous machine, doesn't it?" And the witness answered "Yes."

After argument of counsel, the court ruled upon the objection as follows: "The controlling question in this case is one of good faith, and the government charges that these people were not engaged in a legitimate enterprise, but were using it for the purpose of defrauding the public. Now, then, if they had these patents, or pretended to have them, knowing at the time that they were not what they were representing them to be, and based upon that, insisted and represented that their stock was of a certain value, and was increasing in value all the time, and that they proposed to go ahead and manufacture these machines, it would come within the terms of this indictment, and would be a question that I think the jury have a right to consider, in determining whether they were acting in good faith in this transaction. If they were, then, of course, that is the end of the case. If not, and

they come within the provisions of the indictment, and sustained by the testimony, they would be guilty of the charge against them.

"Therefore, I think the Government has the right to show that, notwithstanding these people had patents, if they knew at the time that their patents were invalid, and would not permit them to manufacture these machines, it is a circumstance going to determine whether they were acting in good faith or not. It does not go to the validity of the patents. We are not trying that question. It goes to the good faith of the defendants, and for that reason I think the testimony is competent."

And the witness was permitted to answer the question, and this testimony is in Assignment V, page 293, Transcript. Under the said ruling of the court, the witness testified that the Lindeloff patent was issued February 14, 1899, which was cited against the Bilyeu patent, and the witness said he had read the claim of the Lindeloff patent in connection with the machine shown and described in the Bilyeu patent, No. 1,114,574, and in his judgment the construction shown and described was within Claims 1 and 2 of the Lindeloff patent.

The district attorney asked the following question: "What would you say as a patent expert as to whether or not the claims numbered 1 and 2 of the Lindeloff, as allowed, dominate and control these claims in the Bilyeu cashier?" And the witness answered: "These claims as allowed dominate the construction shown in the Bilyeu cashier."

And in like manner the witness testified about patent No. 885,136, patented February 28, 1911, to Thomas Bilyeu and W. S. Overlin, and assigned direct to the International Money Machine Company; that the purpose of this machine was the same as that of the patent to Bilyeu hereinbefore last recited; and the witness testified that the Lindeloff patent was cited against that application, and that as, an expert, in his judgment the claims of the Lindeloff patent dominated this patent in the same way that they did the patent previously spoken of, the original patent. (Page 293, Transcript.)

Thereupon the witness testified (page 294), in substance, that the witness referred to the patent in speaking about citing; that they generally made a positive rejection in view of that as meeting it, as anticipating the claims; they reject the claim to which that patent applies; that in the prosecution of an application through the patent office the solicitor and examiner give information back and forth until they finally get exactly what is thought to be patentable by the patent office; that the patent office delivers a written opinion to the applicant that he is not entitled to a patent because there has been another patent prior to that already issued, but that when they do not reject it, but issue a patent, they do not tell him that; they simply cite the art, cite the patent; that the department did not express any opinion regarding the infringement, and that the witness did not express

any opinion when that particular patent was issued, not as dominating, simply anticipating.

And thereupon, in view of the evidence, counsel for defendants moved to have the evidence stricken out.

And being further examined by the district attorney, the witness testified that a letter of rejection is written in which the patent is identified and the applicant is told that his claim is rejected, in view of that patent, in anticipation, but that when it was not rejected, if it was not to be rejected on that patent, that patent would not be cited except in a friendly way, perhaps, to show what the prior art was. And the witness then stated that he believed in his judgment claims 1 and 2 of the Lindeloff cover the construction disclosed by the Bilyeu Cashier; that that was witness' opinion after examination; that nobody in the patent office gave an opinion to Mr. Bilyeu about the dominating control referred to.

Whereupon counsel for the defendants said: "I think I am entitled to have that out, for it didn't go to Mr. Bilyeu."

The Court: "I understand they notified him of this prior patent."

Counsel for defendants: "They didn't notify him of the witness' opinion as an expert, because it was not their duty to give him that information."

The Court: "That is clear, but they did notify him of the patent, of the prior patent."

Counsel for defendants: "Yes, they cited the patent."

The Court: *"And advised him of that, so he knew there was such a patent, and he took his own chances with reference to disposition."*

Counsel for defendants: "I suppose for his information about that, but he didn't have the benefit of this witness' opinion that the jury had."

The Court: "No, goes to the question of his good faith."

And the court overruled the motion to strike out the testimony, which is Exception "E," page 203, Transcript of Record. And the witness testified that there were thirteen patents cited in the Bilyeu patent issued prior to that time, including the Lindeloff patent.

Then, in Assignment VI, which is Exception "F," page 211 of the Transcript, the witness testified about Application No. 555,552, filed April 14, 1910. by Bilyeu, Overlin and Gridley, and still pending; that the assignment was made to the International Money Machine Company; that it was an invention to cover another machine of the Bilyeu cashier type, and the witness said that there were ten patents cited against that.

In the same assignment of error witness testified concerning Application No. 638,434, filed by W. S. Overlin, assigned to the United States Cashier Company, and by mesne assignments to the International Money Machine Company. The filing was November 3, 1911. This was a machine for

delivering paper currency. The witness said there were nine patents cited against that. One was a patent that had been issued to a man by the name of Cook. The Cook patent was No. 807,724, dated December 19, 1905, and in the witness' judgment claim 63 of the Cook patent includes the drum structure disclosed in this application, and dominates it.

The rest of this assignment of error raises another question, different from the one we are now discussing, and we will postpone that and treat it separately.

In Assignment VII the witness testified, over the same objection and exception, which is Exception "G," page 216, Transcript, that there was an application, No. 702,164, filed by Nelson White, W. S. Overlin and F. A. Bullington. The invention was a mechanical cashier, adding and listing machine. The patent had not yet been granted. It was assigned to the United States Cashier Company, and afterwards to the International Money Machine Company by the Cashier Company. The machine comprised an adding machine, with printing attachment to print the amount separately and to take totals. The witness testified that there were twenty-four American patents and two German and two English patents cited by the examiner against that machine, and that that patent had been placed in interference by Nelson C. Oviatt on September 29, 1914. There had been 147 claims made in the application, and of these claims three were made counts in the issue of interference, and disregarded.

ing these, leaves 144, of which 20 have been allowed and 124 rejected.

The witness then testified about Application No. 710,512, filed by W. S. Overlin, for money paying, changing and listing machine, filed July 19, 1912. This machine was called the Computing Machine, and was the same machine that had been identified by the witness Overlin upon the stand as the computing machine which he had built. No patent had been granted. This had been assigned by Overlin to the United States Cashier Company and by the Cashier Company to the International Money Machine Company. After describing the machine, the witness testified that there were twenty-one United States patents cited against that machine and three English and two German patents. That there were two patents to a man named Osborne cited against that patent, Osborne patent No. 864,185, dated August 27, 1907, and Osborne patent No. 982,853, dated January 31, 1911. The witness said he had examined the Osborne patent carefully; that it had been issued to the National Cash Register Company, Dayton, Ohio, as the assignee from Osborne, the inventor. There were 115 claims in the Osborne patent.

Whereupon the district attorney asked the witness the following question: "Now, I wish you would make a comparison and show to the jury, I would like to have you do it carefully and in detail, whether or not this Osborne patent dominates and controls this change computing machine; and

if it does so, in what manner it does it, and what claims there are in the Osborne patent that do it."

And the witness then testified, in answer to said question, that he found several which, in his judgment, included the construction of the machine shown here as the Computing Machine. The witness noted Claim 18 of the Osborne patent, and read it, and he read Claim 47 and Claim 100 and Claim 101 of the Osborne patent, and then testified that the claims in the Osborne patent were fundamental and basic, and that, in the judgment of the witness, it would be extremely difficult for any one to evade that patent, that the only way he could escape it would be to invalidate it.

All of the foregoing testimony was taken and received over the objection of the defendants that it was incompetent on the question of good faith, or for any other purpose, to prove that the patents or applications involved could be affected by citation of a prior patent, and an exception was allowed, which is Exception "G."

Without making this statement too prolix, it may be stated generally that a patent, dated July 6, 1915, issued to the Cashier Company and assigned to the International Company, was affected by the first claim of the Lindeloff patent. This is Assignment VIII, Exception "H," page 218, Transcript of Record.

Assignment IX, Exception "I," page 219, Transcript of Record, concerned testimony about an application filed by one Bailey for a change-making

and computing machine, assigned to the United States Cashier Company, and that this was dominated by the Osborne patent.

Assignment X refers to a patent issued to one Pfeiffer, which the witness says was cited against the Bailey patent described in Assignment IX, and that eighteen claims in the Pfeiffer patent included the constructon of the Bailey machine described in Assignment IX. This was Exception "J," page 220, Transcript of Record.

Assignment XI refers to an application for a currency paying and computing machine, issued November 5, 1912, and assigned to the United States Cashier Company, and by them to the International Money Machine Company. Witness testified there were twenty-one patents cited against that application, three of which were German. This was Exception "K," page 221, Transcript of Record.

The next assignment, No. XII, was an application by Thomas Bilyeu, filed January 18, 1913, being a paper money delivering machine. This was assigned to the United States Cashier Company, and by it to the International Money Machine Company. Witness said in his opinion this application contained rather broad claims that had already been allowed. This is Exception "L," page 222, Transcript of Record.

Assignment XIII concerns an application by Nelson White, filed March 20, 1913, for an adding and listing machine, assigned to the United States Cashier Company, and by it to the International

Money Machine Company. It was an improvement in an adding machine. There were twelve claims allowed on the application and fourteen objected to as not being clear enough. Against this application the witness testified there were ten patents cited, one English and one German, and the others United States, and that the patents cited were Burroughs and Pike. This is Exception "M," page 223, Transcript of Record.

Assignment XIV refers to an application filed by Thomas Bilyeu, May 13, 1913, for a paper currency paying machine. This was assigned to the United States Cashier Company, and by it to the International Money Machine Company. The witness said he considered the claims in that application broad. There were eight prior patents cited against that application during the consideration of that patent. This is Exception "N," page 223, Transcript of Record.

Assignment XV refers to an application filed by Nelson White, May 6, 1914, for ribbon feeding machine. This was assigned to the United States Cashier Company, and by that company to the International Money Machine Company. No patent had been granted on this application, and no amendment filed. There were ten claims in the application, of which three specific ones had been allowed and seven rejected, and there were seven prior patents cited against this application. This is Exception "O," page 224, Transcript of Record.

Assignment XVI concerned an application filed by Nelson White May 12, 1914, for a coin delivery machine. It was assigned to the United States Cashier Company, and by it to the International Money Machine Company. This was designed for the same purpose as the so-called lightning change maker. It was a complete reorganization and different organization. Witness testified there had been eleven prior patents cited by the patent office on this application. This was Exception "P," page 225, Transcript of Record.

It will be seen from the language of the court quoted above in ruling upon this evidence (page 292, Transcript of Record) that the evidence of the prior citations of patents in the patents and applications involved was admitted for the purpose of attacking the good faith of the defendants in making the applications and in procuring the patents. This language of the court explains that: "Therefore, I think the Government has the right to show that, notwithstanding these people had patents, if they knew at the time that their patents were invalid, and would not permit them to manufacture these machines, it is a circumstance going to determine whether they were acting in good faith or not." That is to say, that the jury might conclude from Mr. Sewell's testimony about the previous citations, both of named patentees and of others, that the defendants, in accepting the allowances made in their applications and the patents, were guilty of fraud. It is the law, and was sufficiently

well stated by Mr. Sewell in his testimony quoted, that when an application is made, the question before the department officers is whether it shall be allowed. If it conflicts with prior patents, it cites those patents to the applicant. If the department, however, concludes that the citation is not applicable and that the claim is allowable, it will be allowed. So that in every case where a claim had been allowed or a patent issued, the department necessarily decided that the claim allowed or the patent issued did not conflict with the patents cited against it. And yet the mere fact that in the process of getting these applications allowed and patents issued the department had referred to prior patents, is declared by the ruling of the court to be an evidence of bad faith, notwithstanding the decision of the department that the application is allowable and the patent good. This is so clearly error that it would be a waste of time to argue the question at length. In fact, this court has decided the question. We cite:

Miller v. Eagle, 151 U. S. 208; 14 S. C. R. 310, 319.

Boyd v. Poole Co., 15 S. C. R. 837.

And particularly, *Ransom v. Hyatt*, 69 Fed. 148, an opinion of this court, Judge Gilbert speaking for the court, where the Supreme Court decisions upon the question were examined and reconciled.

And on the question that the expert opinion of the witness Sewell as to the conflict of the patents

with the patents and applications of the defendants is not competent evidence, we cite:

Winans v. New York R. R. Co., 21 How. 98, 101.

Corning v. Burden, 15 How. 252; 20 U. S. 503, 508.

The reason for this is that the question of conflict is a question of law, to be determined by the court or jury having it under consideration, and is not the subject of expert opinion. The expert opinion may be given, in this as in other cases, to assist the court in reaching an opinion, but the opinion of the witness is incompetent. And yet Mr. Sewell, who was an influential witness and finely qualified, was allowed to go to the jury upon the question.

We turn now again to Assignment VI. The witness was proceeding to testify about Application 702,164, filed June 7, 1912, called the Bank Cashier. At this point it was admitted by the district attorney that the negative in the indictment as to the ownership of the patents by the company did not include the Bank Cashier, and that it had been left out of the indictment inadvertently. Thereupon the defendants objected to the evidence offered, which was to show that, notwithstanding the admission in the indictment, the defendants never had in fact obtained a patent for the Bank Cashier. The objection of the defendants was whether it was competent to prove this fact in the absence of a statement in the indictment that the representation concerning it was false. The coun-

sel for the defendants stated the objection as follows: "I will have the record show that the part of it I am sure about is that the indictment, in effect and legal substance, alleges by admitting that that machine was patented, and that no issue is raised between the indictment and the plea of not guilty on that question." The argument of the district attorney upon the question is found on page 209, Transcript, and without repeating it at length, it is sufficient to quote this much of the language: "Now, I desire to prove that this stock was of very little value, and practically worthless, and for the purpose of that I desire to prove just exactly what this corporation owned at the time that it was selling this stock. For that purpose alone, I believe I am entitled to prove just what they had." What the court understood is found in the language of the ruling found on pages 209 and 210 of the Transcript. The gist of the opinion is found in this language: "I think the Government is entitled, in a case of this kind, where it depends on circumstances, to put in evidence other acts of a similar kind, transactions of a similar kind that happened at the same time. And when they advertised these machines the Government alleges they didn't have, they advertised another machine they didn't have at the same time, and it is for the Government to show the purpose and intent for which they advertised the machine, and for that reason I think it is competent. But I don't think for the purpose of showing that was one of the means by which the

defendants intended to carry out that conspiracy. I think the Government is required in an indictment of this kind to negative those allegations, but it simply goes to the intent or purpose of the defendants."

But this was not putting in evidence other acts of a similar kind, transactions of a similar kind that happened at the same time. It was putting in evidence, evidence to show the falsity of a representation which the indictment admitted was true. If it would be proper to prove this representation false without a negative, it would be equally proper to prove every other representation mentioned in the indictment false without a negative, and the conclusion would have to be that it was not necessary to negative the truth of any of the representations in order to prove them false. Conceding that it might be proper to prove that a representation made by the defendants, not mentioned in the indictment but outside of the indictment, for the purpose of showing the intent of the defendants, yet that must be limited to other transactions than the transactions described in the indictment.

We rest in this simply upon the well-established rule of law that to charge the defendants with the consequences of a false representation, the pleading, whether in a civil or criminal case, must show that the representation is in fact false. The rule about other transactions to show intent is, prop-

erly administered, a wholesome rule, but it is not applicable here.

There remains the question whether or not the instructions of the court cured the error in the admission of the Oviatt testimony concerning the Payograph machine and the transaction with Bilyeu, and Sewell's testimony reciting the citation of prior patents against the patents and applications of the defendants, and corrected the impression conveyed to the jury by the court's rulings upon these questions made in their hearing. These rulings themselves had the effect of instructions to the jury as to the purpose of the testimony admitted. At the close of the case the defendants' counsel asked the court to give a series of instructions, which are found on pages 231 to 235, Transcript of Record. The court gave some of these instructions. They related to the questions of law that we are here discussing. The question we now present to the court is whether or not these instructions cured the errors complained of in respect of the Oviatt and Sewell testimony.

The only charges relating to the subject given by the court are contained in the following excerpt (page 247, Transcript of Record): "It is charged in the indictment that one of the means to be used by the alleged conspirators to carry out their fraudulent scheme was to represent that the United States Cashier Company owned patents to the certain coin machines heretofore mentioned, when in truth and in fact they did not own such patents.

If it was a part of the conspiracy, if a conspiracy existed, that the defendants should represent that the corporation owned patents to the machines which they proposed to manufacture, and such representations were false, and known to be so to the parties making them, and were made for the purpose of inducing and persuading persons to purchase stock, it would constitute a scheme to defraud within the statute. And you in this connection should consider any willful misrepresentation that the defendants may have made in relation to the patent situation. But if at the time these representations were made the company did in fact have patents, issued by the patent office of the United States, for any of the machines, the representations, so far as that particular machine was concerned, would not be false. *Bad faith or fraudulent misrepresentation cannot be imputed to the defendants in respect of patents in fact issued, and owned by them, or in respect to claims that are in fact allowed, because of some alleged infringement.* There is a presumption of law that, where a patent is issued by the United States Patent Office, it does not infringe any known patent, and a patentee in accepting such patent is not thereby guilty of bad faith. You are not called upon to decide in this case whether the patents issued or the claims allowed were in fact an infringement of some invention or patent, or were dominated or affected injuriously by the Osborne and Lindeloff or the Cook patents, or any previous invention, and the

evidence of the witness Sewell to that effect should be disregarded. The question on this branch of the case is, were the representations made by the defendants, if any, concerning the patent situation, false and made in bad faith, with a fraudulent intent to deceive purchasers of stock in or of the company, or were they made in good faith, with an honest belief in their verity?"

Of course, this law is directly in conflict with the law held by the court in admitting the testimony and announced to the jury in the trial of the case on the rulings. This instruction constitutes an admission that the court was in error in admitting the evidence. But it will be seen, first, that the evidence is not withdrawn from the consideration of the jury in direct terms; second, that the rulings of the court in the admission of the testimony are nowhere referred to, and the jury are not told that the court had made a mistake in admitting it; third, the instruction did not tell the jury that that evidence was incompetent. The jury are not told that they could not decide, but only that they were not called upon to decide whether the patents issued or the claims allowed were an infringement of some invention or patent, or were dominated or affected injuriously by the Osborne and Lindeloff or the Cook patents, or any previous invention. On the other hand, the jury are told to disregard the evidence of Sewell to that effect. Mr. Sewell had testified that in his opinion those three patents, and some others not mentioned in

the instruction, dominated some of the patents and applications of the defendants. That was given as an expert opinion. The jury are told to disregard that opinion. But the evidence of the previous citations and of these dominating patents remained in the case. All of the patents and applications had citations made, which the court had admitted as affecting the validity of the patents and applications secured by the defendants. The error was repeated many times. Our contention is, under the authorities, that to cure the errors under the circumstances, if they could be cured, would require a more specific reference to the erroneous evidence and a more specific instruction to the jury to disregard, not only Mr. Sewell's expert opinion, but to correct the impression that must have been left with the jury by the court's previous opinion, expressed upon its competency and effect. As the matter stands, the court, in ruling on the evidence, as shown by the language of the court heretofore quoted, had given to the jury what it then conceived to be the law. These instructions give the jury a law exactly contrary. They are left to choose between the conflicting opinions of the court concerning the law.

These instructions say nothing at all about the Oviatt testimony, and yet the objection to that testimony is equally within the principle of his instruction. The patent admitted by the indictment to have been the property of the defendants, and for which the testimony, independent of the in-

dictment, shows they had an application allowed, was held by the court in admitting the testimony to be possibly injuriously affected by the Oviatt claim, so much so as to affect the defendants' good faith in dealing with that patent and that application. Under the instruction as given, of course, that evidence would have been incompetent, because it would have imputed, in the language of the court, "bad faith or fraudulent misrepresentations to the defendants in respect of a patent issued and owned by them, or in respect to a claim in fact allowed, because of some alleged infringement." As to the Oviatt testimony, the instruction is altogether general.

Under the rules of the Federal Court, and of the Supreme Court of Oregon, this instruction is not sufficient to cure the error, either in respect of the Sewell testimony or the Oviatt testimony. As to the Sewell testimony, we cite *State v. Aiken*, 41 Ore. 294. In that case, which was a charge of murder, the court had admitted the declaration of an alleged accomplice after the crime was committed. Bacon was the name of the accomplice. A witness testified that Bacon called at the place of business of the witness, William Woodard, and upon being asked to state what condition Bacon was in, the witness answered that he was muddy and had a lick over the right eye, and his clothes were torn on the shoulder. Upon objection, the Supreme Court held that this evidence was competent, but the district attorney then asked: "You

can give any statement Henry Bacon made." This was objected to, and upon being overruled, the witness continued to state what Bacon said: "His brother was sitting waiting for him, and he says, 'Where the devil have you been? Where did you get that mud? You must have had a scrap.' He said he had. His brother remarked he must have got the worst of it. Henry said, 'You ought to see the other fellow.' That was about all they said. They had a drink, and then left." The Supreme Court held, this being a declaration after the crime of an accomplice, it was not competent and error was committed in admitting it. The contention was made that the error was cured by the instruction of the court. The Supreme Court said:

"The court having erred in admitting the testimony complained of, the question to be considered is whether the error was cured by instructing the jury to the effect that, if they should find a conspiracy existed, any declarations made by Bacon or Malim in Aiken's absence after the homicide could not be accepted by them."

The court said, after stating the sharp conflict as to whether error could be cured by withdrawing it:

"Whatever the rule may be in other states, it is quite well settled that an error committed by inadvertently admitting improper testimony is cured by specifically withdrawing it (citing cases). In the case at bar, Woodard's testimony relating to Bacon's declaration, which

the jury must necessarily have understood as referring to the appearance of Shu, was not specifically withdrawn. The admission of incompetent prejudicial testimony influences the minds of jurors, and, in order to remove the impressions thus created, the direction of the court not to consider such testimony must be so specific that the jurors cannot possibly mistake the instruction (citing *Johnson v. State*, 17 Ala. 618). The court did not admonish the jury not to consider the declaration made by Bacon to his brother in Woodard's presence, but stated to them generally not to consider any declarations made by Bacon or Malim in Aiken's absence after the commission of the homicide. This, in our opinion, was not sufficient to call the attention of the jurors to the particular testimony sought to be excluded."

The Supreme Court of the United States lays down the rule in such cases, and the exceptions, in *Waldron v. Waldron*, 156 U. S. 361, 15 Sup. Ct. Rep. 383. This was a civil case, and error had been committed in allowing incompetent evidence, which was prejudicial. The question was whether the error was cured by the instruction of the court. The court said that in such case

"It is not only the right, but the duty of the court to correct an error arising from the erroneous admission of evidence, when the error is discovered, and when such correction is made it is equally clear that, as a general rule, the cause of reversal is thereby removed. There is an exception, however, to this gen-

eral rule, by virtue of which the curative effect of the correction in any particular instance depends upon whether or not, considering the whole case, and its particular circumstances, the error committed appears to have been of so serious a nature that it must have affected the minds of the jury despite the correction of the court."

In this case the court's withdrawal of the evidence was very much more explicit than in the case at bar. The court said that the evidence objected to was not evidence in the case and was excluded by the court, and instructed them not to draw any inference from it. The court held, however, that the instruction did not cure the error. It is true in this case that the counsel referred to this evidence in the closing argument, and that is given as one of the reasons for the ruling.

The court then cites the case of *Hopp v. Utah*, 120 U. S. 430, 7 Sup. Ct. Rep. 614, quoting therefrom the language of Mr. Justice Field:

"But, independently of this consideration as to the admissibility of the evidence, if it was erroneously admitted, its subsequent withdrawal from the case, with its accompanying instruction, cured the error. It is true that in some instances there may be such a strong impression made upon the minds of the jury by illegal and improper testimony that its subsequent withdrawal will not remove the effect caused by its admission, and in that case the original objection may be available on appeal or writ of error, but such instances are exceptional."

Boyd v. United States, 142 U. S. 450, 12 Sup. Ct. Rep. 292, was a trial for murder. In the court below evidence had been given by the prosecution of five robberies. The evidence of these robberies had been admitted for a specific purpose. In defining the purpose the court below named by name so as to identify two of the robberies, and referred to the other robberies as "these other crimes," and said:

"You are not to consider these other crimes as make-weight against the defendants alone. That is to say, you are not to convict the defendants because of the commission of these other crimes."

The Supreme Court held that the evidence was not proper and that this instruction of the court did not cure the error. It said:

"The charge made no reference to the robberies committed upon Brinson, Mode and Hall, except as they may have been in the mind of the court when he referred to 'these other crimes.'"

And the court said:

"The jury were left uninstructed in direct terms as to the use to which the proof of the Brinson, Mode and Hall robberies could be put in passing upon the guilt or innocence of the particular crime for which the defendants were indicted."

In this case also there was no exception to the instructions, but the court held that the exception to the testimony was not waived by the failure to except to the charge.

In the case of *People v. Wallace* (Cal.), 26 Pac. 650, the defendant was charged with murder. A witness for the state was asked: "After firing of the shots, did this man Moore say to you that Wallace had killed Rice?" This was ruled out, but the prosecuting attorney repeated the question, so that the court finally ruled that the witness might answer directly whether Moore did or did not make any remark at the time and place referred to, indicating that he heard the shots which killed Rice, but must not repeat the language used, to which the defendant duly excepted. The court held this was error, and the error was repeated. In its charge, the court said: "Some evidence has been admitted of the statement made by one Moore at the restaurant of Mr. Guthrie immediately after the shooting, but in this connection I say to you that the defendant at the bar is not bound by anything Moore may have said not in his presence and hearing." The Supreme Court held this did not cure the error, and did not withdraw the evidence. It said:

"It was not a plain and unequivocal direction to them to wholly disregard it as illegal and not proper to be considered at all, and therefore cannot be regarded as obviating the error in the previous ruling of the court."

The opinion in this case was written by Judge DeHaven.

In the case of *People v. Oldham* (Cal.), 44 Pac. 312, statements had been admitted of the declara-

tions of an alleged accomplice. The court, instructing the jury, said: "I charge you that no statements or admissions or confessions, other than his own sworn testimony in court, made by the alleged accomplice Hilton after the commission of the offense charged, and not in the presence of the defendant, should be considered by you as evidence in this case against this defendant, as tending to connect him with the offence." The Supreme Court said:

"Judges are not justified by the law in admitting evidence before the jury, under objection and exception, and then, after the case has been argued by counsel, instruct the jury that such evidence should not be considered by them in making up their verdict. Such a course, if practiced, certainly would be out of the ordinary and not fair to a defendant. This is a fair interpretation of the instruction."

In *Knickerbocker Trust Company v. Evans* (Circuit Court of Appeals, First Circuit), 188 Fed. 549, there was an action tried by a jury. It is sufficient to say that error was committed and repeated many times in the course of the trial, so that the court held that it must have impressed the jury. The court held that the general instruction that the evidence was incompetent, under the circumstances of that case, did not cure and could not cure the error. It said:

"Single instances or several instances of wrongful admission and a subsequent withdrawal of evidence are often treated as harmless, but here there are many instances. They

permeate the record, and while particular instances, standing alone, might be harmless, standing as a whole, as they did here, through the course of a long trial, they make such a mass of suggestion and evidence of intimacy between the plaintiff and its officers and Bennett, that the situation must be accepted as necessarily and naturally imbuing the minds of the jury with hostile impressions quite impossible to eradicate. The conclusion is irresistible that the mass of testimony shown by the record, which was wholly irrelevant, must have prejudiced the jury beyond the possibility of curing through a general withdrawal."

Applying the principle of these cases to the case at bar, the elements mentioned by the cases that make the error incurable are all present. In the first place, the particular evidence is not specifically referred to by the instructions. As to the Oviatt matter, it is not referred to at all. Second, the case comes within the Oldham ruling, because the supposed cure occurs only in a general instruction to the jury at the end of the case, and after argument of counsel. The defendants' counsel had no opportunity in the argument to take advantage of the later ruling of the court, but was obliged to meet the evidence at that time before the jury. And likewise the district attorney would be justified in arguing upon that evidence to the jury, and it must be presumed that he did so. And this is not a slight consideration. The court can see under what disadvantage the defendants' counsel would be to meet this erroneous and prejudicial evidence

upon the assumption, which he was obliged to make under the ruling of the court, that it was before the jury. Third, this case comes within the Waldron case and the Knickerbocker case in this: That the error was not an isolated one, but ran through the whole trial. The competency of the evidence was more than once asserted by the court, and the inference which might be drawn from it suggested, which was that the defendants might, from the evidence, be convicted of bad faith in the case. As we have already said, the Oviatt testimony was prejudicial, and it was emphasized, but it has never been taken away from the jury, unless a general charge would be sufficient announcing a different rule of law. In the Sewell testimony the error was repeated at length and emphasized in like manner. It would be impossible to say that the verdict was not based upon a consideration of these matters, notwithstanding the charge of the court.

It is proper to say that the defendants' counsel, believing that the court had been wrong in admitting the testimony, submitted the instructions which are referred to. If it shall be contended that it was his duty in submitting instructions on that subject to make them explicit enough to cure the error, the reply is that he was not bound to make a motion or to ask an instruction to withdraw the evidence, which, after full and complete argument, had been admitted over his objection. He did not commit the error and was under no obligation to have it withdrawn. However, it may be stated that

the instructions asked by the defendants' counsel were presented in good faith, to present what he conceived to be the correct rule of law in the case, and in order that the court might be assisted as much as possible with the instructions. As the court will see from the record, there were citations of the cases supporting his view.

But the instructions the court gave differed essentially from the instructions asked. In Instruction XI, page 234 of the Transcript, the requested instruction, after asking the court to instruct the jury to disregard the evidence of Mr. Sewell, which was given, proceeded: "And you are to find in accordance with the prima facie presumption that the said prior patents are not infringed by any of the patents obtained by the defendants and the Cashier Company." That last part of the instruction was not given, and it was a direct instruction that we were entitled to have, if we were right about the law. The court correctly stated, in accordance with the instruction, that there was such a presumption of law, but did not tell the jury they were bound to find in accordance with it. Likewise, Instruction III, page 232, Transcript, asked by counsel for defendants, asked the court to say to the jury as follows: "You cannot decide in this case that the patent of Osborne or Lindeloff or Cook dominated or affected injuriously any patent issued to the defendants, etc." The court, in giving that instruction, changed the language to say: "You are not called upon to decide in this case

whether the patents issued or the claims allowed were in fact an infringement, etc.” Perhaps the instruction that the court gave upon that might be ordinarily sufficient to indicate to the jury that such an issue was not in the case, but under the circumstances of the court’s previous rulings, the positive and direct instruction asked for would have been better. However, there were no exceptions to the court’s refusal to give the defendants’ instructions, and there were no exceptions to the instructions the court gave, and we are not referring to this matter for the purpose of predicated any error thereon. What we are doing is to show that the instructions given by the court, which it will be claimed have cured the error, were not even as explicit as those that counsel asked.

The next point we make arises upon Assignments XVII, XVIII and XIX, and they may be considered together. In our judgment these instructions were radically and fundamentally wrong and allowed the defendants to be convicted of conspiring to execute a scheme and artifice not within the terms of the indictment, and also took away from the jury the right to determine the good faith of defendants. We quote from Assignment XVII: “It has been truly said in argument that one of the cardinal points in this case is the intent of the defendants. But what intent? Was it their intent that they could make the business of the United States Cashier Company a success? Was it their belief that they could make the enterprise of the

United States Cashier Company successful? The answer to these questions would necessarily be No." Before going further into these instructions, we pause to inquire what the court meant by this language. It is susceptible of two constructions. In its literal terms it was taking away from the jury the power to find the truth or falsity of the most important allegation in the indictment, and one which characterized in all of its extent and essence the artifice and scheme charged. That allegation is found on page 17, Transcript of Record, and is: "That in truth and in fact, and as the defendants well knew, the said corporation, namely, United States Cashier Company, was not engaged in either the business of manufacturing or selling said machines, or any thereof; but, on the contrary, its business was to sell and dispose of the said shares of stock." If the artifice and scheme was to sell stock and not manufacture or sell machines, then the defendants were charged certainly with an intent not to make the business of the United States Cashier Company a success, and with the knowledge that they could not make the enterprise successful, and did not intend to do so. The court did not merely express to the jury its opinion that the defendants had no intent to make the business a success, but told them in terms so positive what that intent was as in substance and effect to take away from them the decision of the question. The answer to the question the court propounded he said must necessarily be No, and the jury were not permitted

to answer that question Yes. Whether the court intended that or not by its literal language, the instruction was couched in such terms as indicate that the issue in the case of good or bad faith was eliminated from their consideration. And yet, under this indictment and under the authorities, the question of good or bad faith, that is to say, the question of an intent to defraud, is the fundamental and primary and essential question to be determined by the jury. This was an enterprise for manufacturing and selling certain machines, or it was not. The indictment said it was not, and because it was not an honest business and not intended to be a business for manufacturing and selling machines, that the stock was valueless, that is to say, it was bogus stock and a bogus business. Now, it would certainly be a defense to that allegation to show that the defendants were engaged in a business that they expected and believed they could make successful, and that they had such an intent, but the court, by this instruction, literally construed, has cut away that defense from under the feet of the defendants, and has told the jury that the defendants had no such intent and no such honest belief.

But the criticism of the language quoted would not be just, perhaps, if the question were only before the court as to its true construction. The question concerning that language is, how did the jury construe it? What construction would twelve ordinary men put upon that language, coming from

the lips of the judge in the progress of a long instruction? It is impossible not to suppose that the jury understood the instruction literally as it was given. But, frankly, we think the court did not mean that. To come to that conclusion has required some analysis of the whole instruction. It is only after such an analysis that the first impression from that instruction is removed. What the court probably was aiming to do was to tell the jury what intent was necessary to be proved by the Government under the indictment, and not what the actual intent of the defendants was.

But that construction does not make the instruction any better. That will appear from a consideration of the three instructions contained in these three assignments of error. And before going into that analysis we beg to make a brief analysis of the indictment to discover what scheme and artifice the defendants conspired to execute.

The indictment consists of two classes of declarations by the defendants. One class consists of representations of existing facts; the other of promises, assurances and opinions of value. The representations as to value were that the company owned certain patents, and they did not; that they had large orders for machines, while they had none; that their assets and liabilities were incorrectly stated; that they represented that the money to be derived from the stock was to be used for the benefit of the company, and it was not. The promises were that the stock would return big dividends;

that the value of the stock was such as to justify an increase in the selling price from time to time, and that the stock was worth what was asked for it. But all of the representations and all of the promises were means, so charged in the indictment, to carry out and effect a scheme and artifice, which scheme and artifice was to sell stock in a fictitious corporation, and not in a going, bona fide business. Assuming that misrepresentations as to the patents, as to the orders, as to the financial condition of the corporation, might constitute a scheme and artifice within the statute, without reference to the kind of corporation involved, yet the indictment in this case does not describe such an artifice. The difference between an artifice using false representations as to the value of stock in a going business, intended to be successful, and a scheme and artifice to sell stock in a purely fictitious concern, is not a difference in degree, but a difference in kind. We submit that if the business itself was a bona fide one to sell machines and to make a profit for the stockholders, that the defendants cannot be convicted because, in the conduct of that business, they misrepresented, even fraudulently, the financial condition of the stock, or the patent situation. If we are right in that, the instructions are erroneous.

The court said, Assignment XVII: "If they agreed to make false and fraudulent pretenses, representations or promises, if they agreed to make false and fraudulent representations and assur-

ances, for the purpose of deceiving the investors and the public in respect to the true condition of affairs of the corporation, or the value of its stock, then the ultimate intent to make the business of the corporation a success, or the ultimate belief of the defendants that they could finally make it a success, would by no means furnish any condonation or legal excuse for the false and fraudulent representations, which they would under the circumstances agree to make in order to induce the investors and the public to pay over their money."

And in Assignment XVIII the court said that if they made the misrepresentations, "it matters not how confident they may have been that they would be able to make the business of the corporation a success, or how confident they may have been that they would be able to return that money without loss, or with profit, because the representations which they would have agreed to make would be made for the purpose of getting the money in a wrongful manner, and they could not, under the circumstances, make them rightful by pointing to some ultimate good intent."

And Assignment XIX gives the same idea in different, but similar language.

The effect of these instructions is to have the jury understand that the defendants could be convicted of any one of the several misrepresentations of fact, if they found it to be fraudulent, although the representation was made for the purpose of inducing the investor to buy stock which was worth

what it was represented to be; that they would be guilty if their object was to make a profit for the investors. However, this question is not so clear as the next one which arises from these three assignments.

The court did not limit the instructions to representations and pretenses. It included promises and assurances. Now the indictment, as we have already shown, consists both of misrepresentations and promises. Therefore the effect of the first instruction is that if the defendants made a promise that they would get dividends and a profit on the stock they were buying, in the ultimate belief that their promise would be fulfilled and that they would make a success, they still could be found guilty. And in the instruction in Assignment XVIII, the court said if these defendants "agreed that they would put forth the false *promises* alleged, for the purpose of deceiving and misleading investors, etc., then it matters not how confident they may have been that they would be able to make the business or the corporation a success," that is to say, that they would be able to fulfill their promises, "or how confident they may have been that they would be able to return the money without loss, or with profit," and thereby fulfill their promise, nevertheless that would be getting the money of the investors wrongfully and fraudulently. And the error is further illustrated in Assignment XIX, where the court draws a parallel between embezzlement and this case. It says: "It

is a well-known fact that nearly every man who embezzles money expects that he will be able to pay it back without loss, but his taking is wrongful, and his intent to pay it back without loss cannot cancel the wrong." But the comparison is misleading. This case is not like embezzlement. A promise and assurance that the stock would return dividends and be profitable, in the honest belief that the promise and assurance would be fulfilled, is not a wrongful taking. It is not an intent to pay it back to cancel a wrong. It is not a wrong, however much the defendants might be mistaken. And this question is thoroughly settled by the Supreme Court of the United States, in the case of *Durland v. United States*, 161 U. S. 306, 16 Sup. Ct. Rep. 508. That was a case for using the mails to promote a scheme to defraud under Section 5480, which, for the purposes of this point, is applicable to Section 215 of the Criminal Code. It was contended in that case that under that section it would not be competent to prove any fraud except a misrepresentation of an existing fact, and could not be applied to the intention to carry out a contract in the future. But the court held that a scheme or artifice to defraud could consist of representations and promises as to the future, and held the indictment in that case good, because it alleged that the promises were made without any intention of fulfilling them. The matter was decided purely upon the indictment, no other part of the record

being before the court, and on page 511 of the Supreme Court Reporter the court said:

“If the testimony had shown that this Provident Company, and the defendant as its president, had entered in good faith upon that business, believing that out of the moneys received they could, by investment or otherwise, make enough to justify the promised returns, no conviction could be sustained, no matter how visionary might seem the scheme. The charge is that in putting forth the claim it was not the intent of the defendant to make an honest effort for its success, but that he resorted to this form and pretense of a bond without a thought that he or the company would ever make good its promises.”

And the court, in the case at bar, has instructed the jury contrary to that, and has told them that they might convict for making a false promise and a false assurance, believing it to be true.

We are not favored with the contentions that will be made by the district attorney, except that we have reason to believe that the evidence on the part of the Government contained in the exhibits will be urged as sufficient to indicate to this court that the defendants are in fact guilty and that the case ought not to be reversed for that reason. If such a contention shall be made, since we will have no other opportunity otherwise to reply to that contention in a brief, we simply say now that the defendants are entitled to a jury trial, with correct instructions as to the law governing them, and if

error was committed it must be presumed to have been prejudicial; that we are not trying the question of the guilt or innocence of the defendants in this court, but only the question whether they have had a fair and legal trial. That is the only question for the court in any case, and particularly in this case, where the evidence on behalf of the defendants is not made a part of the Bill of Exceptions.

The presumption of innocence in favor of the defendants is equivalent to evidence, and in considering the errors assigned in this case the court must apply that presumption and assume that, even unsupported by evidence, it might be sufficient to overcome the evidence referred to in the Bill of Exceptions, offered by the Government. That the presumption of innocence is equivalent to evidence is decided by the Supreme Court of the United States in the case of *Coffin v. United States*, 156 U. S. 432, 15 Sup. Ct. Rep. 394, where the court reversed a criminal case because the court did not give a requested instruction to the effect that the defendants were presumed to be innocent, although the court below had given an instruction that the jury must find the defendants guilty, if at all, beyond a reasonable doubt.

Before leaving this case we will refer to a claim made in the indictment, and which perhaps will be made in the argument, that there was omitted from the statement of liabilities of the corporation the sum of more than half a million dollars. Of course

such a discrepancy as that, if true, would be a very serious discrepancy. But this result is arrived at from the fact that the statements did not contain the stock liabilities of the corporation. We will give these figures, which will be, we are sure, agreed to as correct by the learned district attorney.

The results of the books, taken by the expert on January 31, 1911, show:

Total assets	\$494,106.21
Total liabilities	198,447.13

But to these liabilities are added:

Capital stock issued.....	\$289,181.35
Stock subscribed, but not issued.....	71,068.30
	<hr/>
	\$360,249.65

This sum was added to the liabilities so as to make the statement of liabilities read \$558,696.78, and the excess of liabilities over assets, by that method of computation, would be \$64,590.57. If the stock liability is not included in the liabilities as a proper item, the excess of assets over liabilities on that date would be \$295,659.08.

This is a contention to make a matter of book-keeping a matter of fraud. In short, it is argued that though a corporation should state truly its actual assets and its actual debts, that its officers would be guilty of fraud because in that statement it was not also stated what would be owing to the stockholders upon a distribution. Such a contention is not tenable. Suppose that subscriptions to

the amount of \$100,000 were paid into the treasury, and there were no debts, the assets would be \$100,000 in cash, and the liabilities would be \$100,000 to the stockholders, and, according to the argument, the corporation would be insolvent.

A statement was made October 31, 1911. The true difference between the actual assets and the actual liabilities on that date, as shown by the books, was the difference between

Actual assets	\$837,576.33
Actual liabilities	159,428.70
	<hr/>
	\$678,147.63

But these liabilities were increased by the expert to more than \$1,000,000 by adding to them stock liability to the amount of \$851,660.15.

On January 31, 1912, the books show:

Actual assets	\$903,334.66
Actual liabilities	83,341.00

Making excess of actual assets over actual liabilities	\$819,993.66
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But to the liabilities there was added by the expert \$1,023,328.65, and by swelling the liabilities in that manner it was made to appear that the excess of liabilities over assets was \$203,334.99.

On May 31, 1912, the books showed:

Actual assets	\$891,971.56
Actual liabilities	83,128.02

Making excess of actual assets over actual liabilities	\$808,843.54
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But to these liabilities there was added by the expert \$1,168,072.81, so that the statement was made to appear that the excess of liabilities over assets was \$359,229.27.

On April 30, 1913, the books showed:

Actual assets	\$805,665.24
Actual liabilities	84,005.20

Making excess of actual assets over

actual liabilities\$721,660.04

But to these liabilities there was added by the expert \$1,197,754.48, making it appear that the excess of liabilities over the assets was \$476,094.44.

On January 31, 1914:

Actual assets	\$772,717.75
Actual liabilities	98,703.85

Making excess of actual assets over

actual liabilities\$674,013.90

But to these liabilities were added by the expert \$1,196,232.82, making it appear that the excess of liabilities over assets was \$522,218.92.

We submit that such a computation is not allowable to sustain an allegation of a fraudulent misstatement of assets and liabilities. There is no error predicated upon this evidence. We refer to it only for the purpose of removing from the mind of the court an impression against the defendants, which would be justified if the matter were left unexplained. There was evidence of discrepancies, however, in the statement of the liabilities in two

or perhaps three instances. The exact amount we have not at hand, but are content that the district attorney shall state the sum to the court if he chooses, with our confident assertion that, when stated, the court will see that the discrepancies are not of such magnitude or moment that they would not ordinarily be explained rather by attributing them to oversight or carelessness than to an intent to mislead the public as to the financial condition of the corporation.

Respectfully submitted,

MARTIN L. PIPES,

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Attorneys for Plaintiffs in Error.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

FRANK MENEFEE, B. F. BONNEWELL, H.
M. TODD, AND OSCAR A. CAMPBELL,
Plaintiffs in Error.

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF OF DEFENDANT
IN ERROR

Upon Writ of Error to the District Court of the United
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U. S. vs. New South Farm & Home Co., Supreme Court,
April 24, 1916.

STATEMENT OF CASE.

The defendants Menefee, Todd, Campbell and Bonnewell were indicted, tried and convicted in the United States District Court of Oregon for a violation of section 37 of the Federal Penal Code alleged to have been committed by the defendants conspiring to violate section 215 of said Code.

While there are nineteen assignments of error, these assignments cover but three propositions of law, and there are in reality but three assignments of error in the entire record. Assignments numbered I, II and III are based upon a ruling of the court permitting the introduction of evidence given by the witness Oviatt in relation to a machine known as the payograph. Assignments of error numbered IV, V, VI, VII, VIII, IX, X, XI, XII, XIII, XIV, XV and XVI are all based upon a ruling of the court permitting the introduction of the testimony given by the witness Sewall relative to certain alleged infringements of certain patents and applications for patents of the United States Cashier Company; assignments of error numbered XVII, XVIII, and XIX are based upon certain instructions given by the

court to the jury relative to the presumption of the intent to defraud growing out of wilful, deliberate, and false statements of facts made by the defendants to induce the payment of money.

The trial began before a court and jury on July 6, 1915, and terminated by a verdict of "Guilty" on the 21st day of August, 1915 (Transcript of Record, pages 98 to 103); during the course of the trial the Government introduced 442 exhibits, consisting in the main of letters and telegrams (Transcript of Record, page 161), and called sixty-four (64) witnesses (Transcript of Record, page 170).

No contention is made by the defendants that the evidence introduced by the Government was not sufficient to sustain and justify the verdict of the jury.

In order to eliminate the enormous expense incident to the printing of the various exhibits, the parties have stipulated (Transcript of Record, page 275) that the following exhibits shall be transmitted in the original as a part of the transcript:

Government Exhibits 1 to 16 inclusive;

Government Exhibit 22;

Government Exhibits 28 to 30 inclusive;

Government Exhibits 34 and 35;

Government Exhibits 45 and 46;

Government Exhibit 53;

Government Exhibits 55 to 57 inclusive;
Government Exhibits 59 to 70 inclusive;
Government Exhibits 74 to 85 inclusive;
Government Exhibits 92 to 108 inclusive;
Government Exhibits 110 to 220 inclusive;
Government Exhibits 222 to 442 inclusive.

In the preparation of the Bill of Exceptions, in order to avoid the necessity of repeating the names of certain of the defendants, the statement is made (Transcript of Record, page 111) that wherever in the statement of the evidence the term "THE DEFENDANTS" is used that it means and includes the defendants Frank Menefee, F. M. LeMonn, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine, and Oscar A. Campbell. In this brief for the purpose of brevity we will use the same term in speaking of these parties in order to save repetition of their names in so many instances.

It is shown by the Bill of Exceptions that at the trial the Government offered evidence which was received, and which tended to prove each, every and all of the following facts:

I.

That at and during all of the times between September 1, 1910, and January 31, 1914, the United States Cashier Company was a corporation organized and ex-

isting under the laws of the state of Oregon, with its principal office and place of business at Portland, Oregon (Transcript of Record, page 108).

II.

That at and during all of the following named respective times and dates the defendants were respectively the following duly elected, qualified and acting officers of said corporation, to-wit:

Frank Menefee, the President and Director from September 1, 1910, to January 31, 1914; and the General Manager from September 28, 1910, to January 31, 1914;

F. M. LeMonn, the Sales Manager from September 1, 1910, to November 1, 1912;

O. E. Gernert, an Agent, Salesman, and Assistant Sales Manager from January 1, 1911, to April 1, 1912;

B. F. Bonnewell, a Fiscal Agent and Salesman from April 15, 1911, to January 31, 1914;

H. M. Todd, a Sales Agent from April 15, 1911, to September 1, 1913;

Joseph Hunter, a Salesman from May 26, 1911, to January 31, 1914.

O. L. Hopson, a Sales Agent from November 23, 1910, to July 1, 1913;

P. E. Muraine, a Salesman from March 6, 1911, to January 31, 1914;

Oscar A. Campbell, a Director from June 12, 1911, to January 31, 1914; the Vice-President from January 30, 1912, to January 31, 1914; and a Salesman from January 1, 1911, to July 1, 1913;

Thomas Bilyeu, a Director from June 9, 1913, to January 31, 1914. (Transcript of Record, pages 108, 109 and 110.)

III.

That the capital stock of the corporation at and between all of the dates mentioned in the indictment amounted to the sum of one million two hundred thousand dollars (\$1,200,000.00), segregated into one hundred twenty thousand (120,000) shares of the par value of ten dollars (\$10.00) each. (Transcript of Record, page 110.)

IV.

That at the city of Portland, within Multnomah County, Oregon, and on or about September 1, 1910, THE DEFENDANTS did then and there unlawfully, wilfully and feloniously conspire, confederate and agree together to commit the acts made offenses and crimes by the laws of the United States to prevent the use of the United States mails to promote fraud, to-wit, section

two hundred and fifteen of the criminal code of the United States; that is to say, **THE DEFENDANTS** did then and there unlawfully, wilfully and feloniously conspire, combine, confederate and agree together and with divers other persons, to devise and execute a scheme and artifice to defraud to be effected by means of the post office establishment of the United States, and to obtain money and property by means of false and fraudulent representations, pretenses and promises from the fifty-five persons named in the indictment, and therein termed **INVESTORS**, and from divers other persons, and the public generally, by inducing, inciting and procuring the said **INVESTORS** and divers other persons and the public generally, to open communication with **THE DEFENDANTS** and with the said United States Cashier Company, a corporation, and by inducing, inciting and procuring the said **INVESTORS** and divers other persons, and the public generally, to purchase from **THE DEFENDANTS** and from said corporation, the shares of stock of said corporation and to pay over, deliver and to transfer to **THE DEFENDANTS** and to the said corporation, in exchange and payment for said shares of stock the money and property of the said **INVESTORS** and of divers other persons, the payment of said sums of money to **THE DEFENDANTS** and to the said corporation, and the transfer of said property to **THE DEFENDANTS** and to the said corporation to be induced, incited

and procured by the false and fraudulent representations of THE DEFENDANTS to be made to the said INVESTORS and to divers other persons by THE DEFENDANTS. (Transcript of Record, pages 111 and 112.)

V.

That it was a part and portion of said unlawful, wilful and felonious conspiracy, so entered into by THE DEFENDANTS that said scheme and artifice to defraud the said INVESTORS and divers other persons, and the public generally, should be by THE DEFENDANTS carried out, carried on and effected by the further means, methods, manner and plans, that is to say, THE DEFENDANTS would cause, induce, incite and procure the said INVESTORS and many and divers other persons, and the public generally, to pay over and deliver to and to transfer to THE DEFENDANTS, and to the said corporation in payment of and in exchange for the shares of stock of said corporation, money and property of the value of more than the sum of one million dollars, which said payment of said money and which transfer of said property was to be by THE DEFENDANTS induced, incited, procured and obtained by the dishonest, fraudulent and false representations and promises hereinafter set forth, all to be made to the said INVESTORS by THE DEFENDANTS and to divers other persons and the pub-

lic generally, and to swindle, cheat and defraud said INVESTORS and each, every and all thereof, and various and sundry other persons, and the public generally, out of all of the said sums of money and the said property that the said INVESTORS and various other persons, and the public generally, should pay over and deliver to THE DEFENDANTS or either thereof, or to the said corporation. (Transcript of Record, pages 112 and 113.)

VI.

That for the purpose of inducing and procuring the said INVESTORS and divers other persons and the public generally to purchase said shares of stock of said corporation, and to pay and deliver to THE DEFENDANTS and said corporation money and property in payment therefor, THE DEFENDANTS would falsely and fraudulently and by means of advertisements and letters to be by THE DEFENDANTS transmitted through the mail, represent, pretend and promise that the said corporation owned the patents to a certain change computing machine, a certain bank cashier machine, a certain lightning-change-maker, a certain currency paying machine, and a certain new style adding machine; that the said corporation was engaged in the business of manufacturing and selling all of said machines; that the said shares of stock were of great commercial value, and that large dividends and profits would

surely be paid thereon within six months from the date of purchase; that the corporation was the owner of large bona fide orders for the purchase of said machines, out of which it would make large and certain profit; that the financial condition of the corporation was excellent, and its assets far exceeded its liabilities; that all of the money derived from the sale of stock would be paid into the treasury of the company for the purposes of increasing its assets, making its shares of stock more valuable, and for the purpose of purchasing and building factories in which to increase the manufacture of said machines; that on account of the splendid financial condition of the corporation **THE DEFENDANTS** were justified in raising and increasing the selling price of the shares of stock from the par value of ten dollars (\$10.00) each to the selling price of fifty dollars (\$50.00) each. (Transcript of Record, pages 113 to 116.)

VII.

That in truth and in fact and as **THE DEFENDANTS** and each, every and all thereof at and during and between all of the times and dates mentioned in the indictment then and there well knew:

(a) Neither the said corporation nor any of **THE DEFENDANTS** owned the patents to said certain change computing machine, or said certain lightning-change-maker, or said currency paying machine, or said

certain new style adding machine, or either thereof; and

(b) The said corporation was not engaged in either the business of manufacturing or selling said machines or any thereof, but, on the contrary, its business was to sell and dispose of said shares of stock; and

(c) The said shares of stock and each, every and all thereof were of very little value and practically worthless; and

(d) No dividends whatsoever would ever be paid by said corporation to any person who should purchase the said shares of stock; and

(e) None of the INVESTORS or any other person would ever receive from said corporation any dividend whatsoever; and

(f) The said corporation was neither the owner nor in the possession of the said alleged bona fide orders for the purchase of said machines; and

(g) The financial condition of said corporation was not excellent, but the said corporation was absolutely insolvent; and

(h) The value of the assets of said corporation amounted to a sum much less than the total amount of its liabilities; and

(i) A large part of the stock which would be sold under the representations that it was treasury stock, the

proceeds of which were to go into the treasury, was the privately owned stock of **THE DEFENDANTS**, and all sums of money received thereon would be converted by **THE DEFENDANTS** to their own use and benefit; and

(j) **THE DEFENDANTS** were never justified in either raising or increasing the selling price of said shares of stock; and

(k) Each and every person who would purchase said shares of stock would sustain a loss on account of said transaction of all sums of money which he would pay to the said **DEFENDANTS** in payment therefor. (Transcript of Record, pages 116 to 119.)

VIII.

That it was a further part and portion of said unlawful, wilful and felonious conspiracy that said scheme and artifice to defraud was to be by the said **DEFENDANTS** carried out by the further plan; that for the purpose of inducing, inciting and procuring the said **INVESTORS** and the public generally to purchase said shares of stock **THE DEFENDANTS** would, during the existence of the said conspiracy, fraudulently publish false and untrue written and printed statements of the assets and liabilities of said corporation, in which the assets of said corporation would be stated to be sums greatly in excess of the value of all of said assets, and

in which there would be omitted therefrom liabilities owed by said corporation, amounting to more than the sum of one-half million dollars (\$500,000.00); (Transcript of Record, pages 119 and 120;) that large sums of money received from the INVESTORS by THE DEFENDANTS would be appropriated by the said DEFENDANTS to their own use and gain; that the selling price of the stock was to be by THE DEFENDANTS increased at various times from a par value of ten dollars (\$10.00) per share to a selling price of fifty dollars (\$50.00) per share; that the postoffice establishment of the United States was to be by the said DEFENDANTS used in carrying out said scheme and artifice to defraud. (Transcript of Record, pages 121 and 122.)

IX.

That the conspiracy was to be and was a continuing conspiracy and that it was to and did continue at all times between September 1, 1910, and January 1, 1915. (Transcript of Record, page 122.)

X.

That the defendants Bonnewell, Menefee and LeMonn committed each, every and all of the overt acts mentioned in the indictment in the manner and at the several times and places respectively alleged therein. (Tr. p. 123.)

XI.

That the Portland Morning Oregonian, the Oregon Journal and the Evening Telegram, at and during all the times mentioned in the indictment, were newspapers published and issued daily and regularly at Portland, Oregon; during all of said times said newspapers and each thereof daily transmitted more than twenty-five thousand (25,000) copies of each publication through the agency of the postoffice department of Portland, Oregon, to subscribers located in all parts of the United States; (Tr. p. 123); that the defendants Menefee and LeMonn inserted in said newspapers and each, every and all thereof certain advertisements set out and described in the transcript at pages numbered 124 to 136.

In these advertisements, all of which were full page displays, (Tr. p. 136), it was specifically stated:

(a) That the value of the patent rights for the Bilyeu cashier for the United States alone is almost priceless;

(b) That the stock would positively advance in price;

(c) That the company would pay one hundred per cent dividend annually;

(d) That millions of dollars in profit would be made;

(e) That immediate investment in the stock should be made;

(f) That one machine alone was sufficient to return original investors tremendous profits;

(g) That the company owned the patents to the Change Computing Machine, the Bank Cashier machine, the Lightening Change Maker, the Currency Paying machine, and the New Style Adding machine;

(h) That the methods of handling money would be revolutionized;

(i) That there never was a machine placed on the market for which there was such a great and actual need;

(j) That the record of the company was unparalleled and the company was fully financed;

(k) That the company was the manufacturer of said machines and all thereof;

(l) That the machine was the product of the United States Cashier Company;

(m) That the machines of the company would out-rival the cash register and typewriter in usefulness;

(n) That the machines of the company were new and novel. (Tr., pp. 124-136).

XII.

That at the time these advertisements and each, every

and all thereof were inserted and published in said newspapers, the United States Cashier Company did not own said patents to said machines and the applications for said patents had not been filed (Tr. p. 188).

XIII.

That the American Cash Record Company was a corporation organized and existing under the laws of the state of Washington, and that during all of the times mentioned, specified and stated in the indictment, the defendant, Thomas Bilyeu, was the president and a director thereof, and was the owner of one-fourth of its capital stock; that the United States Cashier Company, on September 28, 1910, purchased from the American Cash Record Company applications for patent No. 555,552; No. 519,489 and No. 522,240, for a purchase price of \$200,000 in cash and \$60,000 of the stock of the United States Cashier Company; that from time to time thereafter and up to and including the year 1913, the United States Cashier Company made many cash payments to the American Cash Record Company and to the defendant, Thomas Bilyeu, and that the defendant Bilyeu, during these years, received in cash from the United States Cashier Company, on account of said contract, more than the sum of \$50,000; that in November, 1911, the United States Cashier Company purchased from the defendant Thomas Bilyeu patent rights covering the same applications for the republic of Mex-

ico for the sum of \$15,000, but that the United States Cashier Company never did anything with any of these rights; that in June, 1912, the United States Cashier Company purchased from the defendant Bilyeu and one Overlin the rights to a currency machine that had been built by Overlin. The consideration of this purchase was that the company was to sell for Bilyeu and Overlin 1600 shares of stock owned by them and to pay them for the stock at the rate of \$12.50 per share.

Bilyeu saw the advertisements in the Oregonian, Journal and Telegram referred to in this brief; that upon one occasion the defendant Bilyeu had assisted in the sale of the stock of the United States Cashier Company and had represented to the purchaser that the company owned the patents to all the machines which it was advertising and selling. That during all of the times mentioned in the indictment the defendant Bilyeu was a duly licensed and regularly admitted patent attorney. (Tr. p. 161-163).

XIV.

That the defendants Menefee and LeMonn, for the purpose of inducing prospective purchasers to purchase the stock of the United States Cashier Company, had written letters to said prospective purchasers in which the statement was made that the patent office at Washington, D. C., could not give the company a single citation wherein the patents of the United States Cashier

Company were infringing on any other patents previously granted and that the United States Cashier Company had made extensive research by the ablest patent attorneys in Washington, D. C., and that said patent attorneys had assured the company that they had full protection for all time to come. (Tr. pp. 163, 164). That prior to the time that said last mentioned letters were written and that during all of the times thereafter, John F. Robb, of Washington, D. C., was the patent attorney for the said United States Cashier Company; that prior to the time that Menefee and LeMonn had written the said letters stating that the patents of the United States Cashier Company did not infringe any prior issued patent, and that the patent office at Washington, D. C., could not give the United States Cashier Company, a single citation wherein the patents of the said company would infringe on any other patents previously granted, and that the patent attorneys for the United States Cashier Company had assured it that it had full protection for all time to come, the defendants Menefee and LeMonn had received from the said patent attorney, John F. Robb, written notice that certain prior issued patents, one issued to a man by the name of Lindeloff and two others issued to the National Cash Register Company, would be infringed by the applications for patents of the said United States Cashier Company, and that the application of the United States Cashier Company for the patent to the Bilyeu cashier and the appli-

cation of said company for the patent to its computing machine would infringe said prior issued patents. (Tr. p. 165.)

XV.

That during the times mentioned in the indictment the company received in cash from the investors and many and divers other persons, on account of the sale of its capital stock, in cash the sum of \$760,165; that it had disbursed over \$400,000 to its agents as commissions upon the sale of said stock; that LeMonn and Menefee each separately received a commission of ten per cent of all amounts received by the said company for the sale of said stock; that these amounts were paid to these defendants by virtue of contracts made by said defendants with the directors of said company about the time said defendants entered the employ of the company; that to the agent making the sale of said stock there was by said corporation paid an additional commission of thirty per cent on account of said sales; that approximately \$1,500,000 in cash and property were received by said company during said times on account of said sales of said stock; that no dividend was ever declared or paid to any stockholder and the company was never in a position to pay any dividend; that all of the defendants received large sums of money from the company over and above all of the amounts they paid into said company, and each of said defendants made large profits during

all of said times in selling and disposing of their own personal stock of said corporation (Tr. p. 168, 169).

XVI.

That the defendant LeMonn made a visit east in the early part of the year 1912 and learned of the manufacture of a machine known as the Payograph which was a rival machine to the one being advertised by the United States Cashier Company; that LeMonn sent letters and telegrams to the defendant Menefee with reference to the matter, which letters and telegrams described said machine, stated that he, LeMonn, believed it to be a winner and advised Menefee to not sell any more of the capital stock of the company until the private stock of the defendants Menefee, LeMonn and Campbell had first been disposed of; that subsequent to the receipt of the said telegram the defendants Menefee and Campbell, at Portland, Oregon, caused the board of directors of the United States Cashier Company to pass a resolution withdrawing all of the company's stock from the market and authorizing the defendants Menefee, LeMonn and Campbell to sell their own personal stock with the sales organization or sales force of the company (Tr. pp. 176, 177).

XVII.

In a letter written by Menefee (see Gov't Ex. No. 367) he had made the positive statement in the year 1913

that he had had knowledge of the Payograph machine for three years.

At the conclusion of all the testimony offered by both the plaintiff and the DEFENDANTS the court directed a verdict in favor of the defendant Bilyeu.

In addition to the foregoing seventeen propositions of fact, all of which were proven at the trial, the government introduced the exhibits as hereinbefore stated which will be dealt with and considered later in this brief.

Assignments of error numbered I to III, inclusive, are all based upon a ruling of the court permitting the witness Oviatt, who was the president of the Payograph Company to testify that he had, in the year 1909, shown to the defendant Bilyeu the principles of a coin paying machine from which later the Payograph machine was built and constructed; that the defendants Menefee and Bilyeu, being unable to dispose of one of the machines of the United States Cashier Company in England on account of a patent having been issued in that country for the Payograph machine, had approached him for the purpose of purchasing the Payograph right, this testimony being received by the court upon the theory that it went to the question of the good faith of the defendants.

Assignments of error numbered IV to XVI, inclusive, are based upon a ruling of the court permitting the witness Sewall, an expert patent attorney from the De-

partment of the Interior, to testify that in his opinion certain previously issued patents, of which the United States Cashier Company had notice would be infringed by certain of the machines of the United States Cashier Company. In regard to the matter of infringement the court instructed the jury as follows:

“It is charged in the indictment that one of the means to be used by the alleged conspirators to carry out their fraudulent scheme was to represent that the United States Cashier Company owned patents to the certain coin machines heretofore mentioned; when in truth and in fact they did not own such patents. If it was a part of the conspiracy, if a conspiracy existed, that the defendants should represent that the corporation owned patents to the machines which they proposed to manufacture, and such representations were false and known to be so to the parties making them, and were made for the purpose of inducing and persuading persons to purchase stock, it would constitute a scheme to defraud within the statute. And you in this connection should consider any wilful misrepresentation that the defendants may have made in relation to the patent situation. But if at the time these representations were made the company did in fact have patents, issued by the Patent Office of the United States, for any of the machines, the representa-

tions, so far as that particular machine was concerned, would not be false. Bad faith or fraudulent misrepresentations cannot be imputed to the defendants in respect of patents in fact issued, and owned by them, or in respect to claims that are in fact allowed, because of some alleged infringement. There is a presumption of law that, where a patent is issued by the United States Patent Office, it does not infringe any known patent and a patentee in accepting such patent is not thereby guilty of bad faith. You are not called upon to decide in this case whether the patents issued or the claims allowed were in fact an infringement of some invention or patent, or were dominated or affected injuriously by the Osborne and Lindeloff or the Cook patents, or any previous invention, and the evidence of the witness Sewall to that effect should be disregarded. The question on this branch of the case is, were the representations made by the defendants, if any, concerning the patent situation false and made in bad faith, with a fraudulent intent to deceive purchasers of stock in or of the company, or were they made in good faith, with an honest belief in their verity? A representation to be fraudulent must not only be false, but must have been made in bad faith and with a fraudulent intent to deceive, to the injury of the person to whom the

representations were made. Honest mistakes or errors of judgment in regard to these matters, or any matters involved in this case, or statements inadvertently made, without a fraudulent purpose, even if material, are not fraudulent. As I understand the testimony it is admitted that, at the time the advertisements were inserted in the newspapers, the company did not own patents to all the machines therein enumerated, and whether those representations that they did own patents to machines to which they had no patents, if such representations were in fact made, were fraudulent and made for the purpose of deceiving purchasers of stock is a question for you to determine from the testimony in this case." (Tr. pp. 247, 248, 249).

And the court also instructed the jury as follows:

"The statute which it is charged the defendants conspired to violate includes everything designed to defraud by false and fraudulent representations as to the past or present, or suggestions and promises as to the future, and the significant fact in this case is the intent and purpose of the defendants in making the representations charged in the indictment, if they were in fact made. The question for your determination is not whether the business which the defendants

were engaged in promoting was a legitimate business, or was practicable or not. If the corporation, and the defendants as officers and agents thereof, entered in good faith upon the business, believing that the representations made by them, or to be made, were true, and that they could and would earn enough to justify the promised returns on the investment, they should not be convicted, no matter how visionary you may consider their plans. Their good or bad faith in these matters is to be determined, and their several acts and declarations construed and interpreted, by conditions as they existed at the time the statements and declaration were made, and as they appeared to the defendants at that time, and not by the final result of the enterprise, or from present conditions.” (Tr. p. 250, 251).

And the court also instructed the jury as follows:

“Respecting the charge of the false representations regarding the enterprise of manufacturing and selling the machines mentioned in the indictment and the evidence, if the defendants honestly and in good faith intended to establish a business to manufacture and sell the machines, in the belief, as the situation then appeared to them, that it would be profitable to the company and its stockholders, you cannot find them guilty of the

charge that the company was not intending to engage in either the business of manufacturing or selling such machines.” (Tr. p. 249, 250).

And the court also instructed the jury as follows:

“The defendants, therefore, are not to be found guilty merely for selling or offering for sale stock in the corporation, although it may have proven an unprofitable investment to the purchaser, nor for mere mistakes or errors in judgment. And there is no presumption of fraud from the fact that glittering and glowing promises may have been made and not carried out, unless it shall appear that the persons who made such promises knew at the time of making same that they could and would not be carried out.” (Tr. p. 259).

Assignments of error numbered XVII, XVIII and XIX are based upon the action of the court in giving the following instructions to the jury:

“It has been truly said in argument that one of the cardinal points in this case is the intent of the defendants. But what intent? Was it their intent that they could make the business of the United States Cashier Company a success? Was it their belief that they could make the enterprise of the United States Cashier Company successful? The answer to these questions would

necessarily be No. If they agreed to make false and fraudulent pretenses, representations or promises; if they agreed to make false and fraudulent representations and assurances, for the purpose of deceiving the investors and the public in respect to the true condition of affairs of the corporation, or the value of its stock, then the ultimate intent to make the business of the corporation a success, or the ultimate belief of the defendants that they could finally make it a success, would by no means furnish any condonation or legal excuse for the false and fraudulent representations, which they would under the circumstances agree to make in order to induce the investors and the public to pay over their money.” (Tr. p. 308).

“In considering this question, the question of and concerning the intent to defraud, you must direct your attention to the intent presented by the particular transaction set out in the indictment. If these defendants agreed that they would put forth the false representations or promises alleged, for the purpose of deceiving and misleading investors and the public into paying over their money, then it matters not how confident they may have been that they would be able to make the business or the corporation a success, or how confident they may have been that they

would be able to return that money without loss, or with profit, because the representations which they would have agreed to make would be made for the purpose of getting the money in a wrongful manner, and they could not, under such circumstances, make them rightful by pointing to some ultimate good intent.” (Tr. p. 309).

“The parallel between such a case as I have presented and the crime of embezzlement is very close. It is a well known fact that nearly every man who embezzles money expects that he will be able to pay it back without loss; but his taking is wrongful, and his intent to pay it back without loss cannot cancel the wrong. And so in this case, if the defendants, by means of the false and fraudulent representations set out in the indictment, agreed to mislead investors and the public generally into paying over to them or to the Cashier Company their money and their property, then their belief that they could ultimately return that money without loss and with profit would not condone the wrong in getting the money by deception.” (Tr. p. 309, 310).

In addition to these instructions relative to the presumption of an intent to defraud growing out of false and fraudulent representations made for the purpose of inducing sales of capital stock the court has also instructed the jury as follows:

“To defraud implies or includes all acts, omissions and concealments which involve a breach of legal or equitable duty, trust or confidence generally imposed, and are injurious to another, or by which an undue and unconscionable advantage is taken of another. It means to wrongfully deprive one of something which he already has.” (Tr. p. 241).

And also as follows:

“It is necessary, therefore, that it should appear to your satisfaction from the testimony and beyond a reasonable doubt, that the conspiracy entered into by the defendants, if there was such a conspiracy, was to devise a scheme or artifice to defraud or to obtain money or property by means of false or fraudulent pretenses or representations, to be effected by the postoffice establishment of the United States.” (Tr. p. 241, 242).

And also as follows:

“The defendants have each entered a plea of not guilty. This plea is a denial of every material allegation in the indictment, and imposes upon the Government the burden of proving each and all of these to your satisfaction, beyond a reasonable doubt, before you will be justified in returning a verdict in its favor.

“Now, the material allegations in brief are, first, that there was a conspiracy, agreement, or understanding upon the part of the defendants; second, that such conspiracy was to devise the particular scheme to defraud set out in the indictment; and, third, that it was a part of the understanding and agreement that the postoffice establishment of the United States was to be used for the purpose of executing the scheme. It is therefore incumbent on the Government to prove, not only that the defendants conspired together to devise the particular scheme set out in the indictment, but that it was a part of such agreement or conspiracy that the scheme should be executed by the use of the postoffice establishment of the United States; and if as to any one or more of the defendants the Government has failed to prove any one or more of the elements necessary to constitute the crime charged, it is your duty to find such defendant or defendants not guilty.” (Tr. p. 245, 6).

And also as follows:

“With reference to the evidence that the price of the stock was raised at intervals, if you find that it was done in the honest belief at the time that the progress of the affairs of the company justified such raise, and that the stock was of

the value of the increased price, though such belief may not have been justified by the then condition of the enterprise as indicated by subsequent events, you cannot find the defendants guilty because they proved to be mistaken about that.” (Tr. p. 250).

And also as follows:

“The statute which it is charged the defendants conspired to violate includes everything designed to defraud by false and fraudulent representations as to the past or present, or suggestions and promises as to the future, and the significant fact in this case is the intent and purpose of the defendants in making the representations charged in the indictment, if they were in fact made. The question of your determination is not whether the business which the defendants were engaged in promoting was a legitimate business, or was practicable or not. If the corporation, and the defendants as officers and agents thereof, entered in good faith upon the business, believing that the representations made by them, or to be made, were true, and that they could and would earn enough to justify the promised returns on the investment, they should not be convicted, no matter how visionary you may consider their plans. Their good or bad faith in these matters is to be

determined, and their several acts and declarations construed and interpreted, by conditions as they existed at the time the statements and declarations were made, and as they appeared to the defendants at that time, and not by the final result of the enterprise, or from present conditions.” (Tr. p. 250, 251.)

And also as follows:

“The indictment also charges that it was the purpose or intent of the defendants to defraud the persons named in the indictment, and the public generally, out of their money. The law presumes that every person intends the natural and probable consequence of his own act, and if you believe from the evidence, and beyond a reasonable doubt, that the defendants, or any two of them, conspired to do the things named in the indictment, substantially in the manner and form as therein set out, and that it was the natural and probable consequence of their acts that purchasers of stock of the Cashier Company would be defrauded, then you would be justified in finding that it was the intent of such defendants so entering into the conspiracy, if there was a conspiracy, to defraud the persons named.” (Tr. p. 252).

And also as follows:

“While circumstantial evidence is admissible and competent to establish a fraudulent intent, it is equally admissible and competent for the purpose of establishing good faith and honesty of purpose, or the non-existence of a fraudulent intent, and it is for you to say in this case, from all the facts and circumstances, whether the defendants entered into a conspiracy to devise a scheme and artifice for the purpose of defrauding those with whom they might deal, as charged in the indictment, or whether they acted in good faith. They are not on trial for evolving or devising an improvident or impracticable scheme, even though you should find their plan to be such. Nor are they on trial for mere errors of judgment. They are on trial for a criminal offense, and an essential element of that offense is an evil or criminal intent, which it is incumbent upon the Government to prove to your satisfaction, beyond a reasonable doubt. And where, as in this case, circumstantial evidence is relied on, the circumstances themselves must be proven, to the satisfaction of the jury and beyond all reasonable doubt, and when so proven, they must not only be consistent with the main fact in issue, namely, the guilt of the defendants, but they must be inconsistent with every other rational hypothesis. The

question for your determination is whether the defendants were acting in good faith in the sale and disposition of the stock of the corporation with which they were connected, or whether they were using such corporation and its business as a basis for a fraudulent scheme. (Tr. p. 258, 259).

And also as follows:

“Now, gentlemen, this is a criminal case. The defendants have each entered a plea of not guilty, and, as I have said to you, that imposes upon the Government the duty of proving every material allegation necessary to constitute the crime, to your satisfaction beyond a reasonable doubt, before you can convict.

“When I have said heretofore in these instructions that a certain fact must be established by the Government, or a certain fact must be proven before you are justified in finding a verdict of guilty, I have meant always that it must be proven to your satisfaction beyond a reasonable doubt.

“The defendants, and each of them, are presumed to be innocent of this charge. This presumption is not a mere fiction which can be disregarded at pleasure. It is a substantial part of the criminal law of the country, and continues and abides with the defendants throughout the trial

until overcome by the testimony. They are not required by law to prove their innocence. The burden is upon the Government to prove their guilt, and that beyond a reasonable doubt." (Tr. p. 264, 265).

"You are exclusive judges, gentlemen, of the credibility of the witnesses and the weight to be given to their testimony. You are also the exclusive judges of all questions of fact, and if at any time during the trial the court has intimated its views concerning any disputed question of fact, or the testimony of any witness, you are to disregard it unless it conforms to your own understanding. (Tr. p. 265, 266).

With reference to the good intent actuating the DEFENDANTS the following is all of the evidence appearing in the bill of exceptions:

"There was evidence tending to show that about January, 1914, the defendant Menefee, and the other officers and directors of the United States Cashier Company, finding that the manufacture of the machines at Portland, where a factory had been established and had been in operation, was not satisfactory and economical, and that it lacked capital, caused to be organized and incorporated the International Money Machine Company, at Terre Haute, Indiana, and had pro-

cured additional subscriptions to the capital stock of that corporation; that an arrangement had been made by which the United States Cashier Company transferred to the International Company substantially all of its assets in Oregon, and had effected a contract with the International Company and promoters, by which the United States Cashier Company received something more than fifty per cent of the paid up stock in the International Company, and that the design and purpose of the defendants and officers of the United States Cashier Company was to continue the manufacture of the machines which they had commenced to manufacture and to conduct the business in Terre Haute, Indiana, and that that Company had proceeded, and at the time of the trial was proceeding to manufacture and sell one of the machines involved, and for which an application for a patent was pending to the International Money Machine Company. One of the machines recently manufactured by the Indiana Company was used in evidence and demonstrated in the presence of the jury to show its working.

“And there was evidence tending to show that the assignments made of the applications and patents by the several persons named in the foregoing testimony had been made by the applicants

or by the Cashier Company to the International Money Machine Company as a part of the assets of the Cashier Company, under the arrangements and contract hereinbefore referred to." (Tr. p. 230, 231).

I have tried in this statement of the facts to present the clear and concise statement and recital required by the rules. It is difficult to obtain a complete understanding of the record without a careful recitation of it all because the trial was so long and tedious that the bill of exceptions cannot in reality be shortened to any extent without an elimination of material testimony. I believe, however, that the foregoing statement will be accepted as showing the material testimony and proceedings upon which the three groups of assignments of error are based.

ARGUMENT.

The record in this case discloses abundant evidence to justify a verdict of guilty upon each, every and all of the separate charges of fraud detailed in the indictment. Taking into consideration the length of the trial, the many charges of fraud alleged and proven, the large number of witnesses examined, the long list of exhibits introduced and read in evidence, and the thoroughness of the instructions to the jury, the record presents a remarkably small number of assignments of error, upon which reversal is sought.

It appears from the bill of exceptions that by virtue of the false and fraudulent representations made by the appellants they collected from the public on account of the sale of the capital stock of the United States Cashier Company the sum of \$760,165; and disbursed over \$400,000 to agents as commissions upon the sale of the stock (Transcript of Record, p. 168); that the defendants LeMonn and Menefee each received ten per cent of all amounts received for the sale of said stock and each of the agents received a further and additional commission of thirty per cent on account of said sales; that on account of said fraudulent representations of said appellants, the said company received during its short existence in cash and property on account of the sales of

said capital stock, approximately \$1,500,000, and gave to the stockholders nothing of value in exchange therefor.

This is not a case where any evidence offered to establish innocence was excluded, but reversal is sought upon three grounds, viz:

1. That certain testimony given by the witness Oviatt was inadmissible;
2. That certain testimony given by the witness Sewall was inadmissible;
3. That the court erred in giving three instructions to the jury.

We will hereinafter fully and completely answer the assignments of error made by the appellants and confidently feel that the court will conclude that no error has been committed. No case of any considerable duration has ever been tried where astute counsel cannot pick out some action of the court and argue with more or less plausibility that there has been error committed.

We understand the well established rule to be that error complained of must have been prejudicial to the appellants to warrant reversal, and must have been such that the appellate court can affirmatively say prevented a fair and impartial trial; this legal proposition is well settled in the federal courts.

Agnew vs. United States, 165 U. S. 36-44.

Brown vs. United States, 142 Fed. 1-4.

Bettman vs. United States, 224 Fed. 819-832.

Van Deusen vs. United States, 151 Fed. 989-992.

Milby vs. United States, 120 Fed. 1-5.

Hoogendorn vs. Daniel, 202 Fed. 431-433 (C. C. A. 9th).

In the case of the State of Kansas vs. Durein (78 Pac. 152-154) the state supreme court, in passing upon the various assignments of error, said:

“The record cannot be interpreted to show error if it is susceptible of reasonable interpretation to the contrary.”

This case was appealed to the Supreme Court of the United States, and the decision was there affirmed *per curiam* (Durein vs. State of Kansas, 208 U. S. 613).

Keeping this well established rule in mind, we preface our argument, in the nature of a demurrer to the assignments of error, with the contention that the alleged errors complained of were not prejudicial to the defendant.

The case of Myers vs. United States, 223 Fed. 919, recently decided by the Circuit Court of Appeals of the second circuit, is in point. We quote from page 925:

“The longer the trial the more improper incidents of this sort there may be. Also in a long

trial there will be occasions when some piece of competent testimony is excluded; if it is unimportant, if it can be plainly seen that its admission could not possibly have changed the result, such exclusion will not constitute reversible error. We do not find it necessary separately to discuss the few instances referred to where testimony was excluded, because the case proved was so plain and convincing that it was manifest the verdict came, not because of any prejudice, but because intelligent jurors could reach no other conclusion. Although the case was confused by a multitude of separate charges of manifold fraudulent statements, by a mass of testimony which ran to inordinate length, by controversies as to this, that, or the other detail of the physical and financial condition of these various mining companies and properties, there is one proposition established beyond any peradventure—defendants invited people to buy “treasury stock,” and when the invitation was accepted and the money paid they gave to the persons they had induced to purchase, not treasury stock, but their own personal stock. That this is fraud of the sort contemplated by the statute under which the indictments were found is settled by our opinion in *Wilson vs. U. S.* (Aug. 20, 1911), 190 Fed. 427, 111 C. C. A. 231, where we held that it was fraud, although the

persons who thus palmed off their personal stock loaned the proceeds of the sale to the company. With that species of fraud shown, it is unnecessary to go into the details of controversies as to the truth or falsehood of glittering statements as to the condition of the properties whose stocks defendants were offering for sale.

This particular fraud was not only proved, but was proved in such a way that no help was needed from the instances of other false statements with which the record is filled. It was proved by defendant's own circulars, by their signed letters, by their admissions on the stand, by their counsel's admissions on the trial, and indeed, practically in this court, because nowhere in the brief of 115 pages is there a single suggestion that they did not unload their own personal holdings on persons whom they induced to believe that they were purchasing treasury stock. With this controlling fact clearly established, it is idle to discuss whether any other misleading representations were or were not made, or what the prospects of the various properties were, or whether some particular bit of evidence might induce a belief that defendants were unprincipled men. Irrespective of all the other testimony and with the conceded facts before them as to sale of stock falsely alleged to be "treasury stock," the jury

would be bound to find that defendants had devised a scheme to defraud, if they were intelligent and conscientious. A man who plans to dispose of his individual stock to another by representing that it is treasury stock, so that the purchaser will suppose that the money he pays for it will pass directly to the company, instead of going into the seller's pocket, has devised a scheme to defraud. When he has effected the sale through such misrepresentations he has defrauded his neighbor; and it makes no difference under this statute what he does with the proceeds of his fraud, the devising of the scheme is enough—plus, of course, the use of the mails. That in this case defendants used the mails in furtherance of their scheme is not, so far as we know, disputed. Every element of the statutory offense has been proved and stands practically undisputed. Under such circumstances only some glaring and obviously harmful error would justify a reversal.”

The case at bar bears a very close resemblance to what was considered by the court in the case of *Myers vs. United States*, *supra*, as the most important, and indeed, the controlling fact in the case. The appellants, in the case at bar, made (among others) the following mis-

representation: We quote from the transcript of record at page 115:

“That a certain large amount of the capital stock of said corporation, which said stock would be offered for sale to the said INVESTORS and to divers other persons and the public generally, belonged to and was the property of the said corporation, and that the money derived from the sale thereof would be by said corporation invested and used in such a manner as to increase the assets of said corporation, and to make its shares of stock more valuable, and particularly for the purpose of purchasing and building factories in which to increase the manufacture of said machines.”

And also from the transcript of record at page 118:

“That in truth and in fact and as THE DEFENDANTS and each, every and all thereof at and during and between all the times and dates mentioned, specified and stated in the indictment, then and there well knew, a very large amount of the shares of stock of said corporation, which THE DEFENDANTS were to represent as being the property of the said corporation, consisted of shares of stock owned by THE DEFENDANTS and all of the sums of money and all of the property received on ac-

count of the sale thereof would be appropriated by THE DEFENDANTS and none of the same or any part thereof would be paid into the treasury of the said corporation, to be used by it, either for increasing the assets of said corporation, or otherwise.”

It is stipulated by counsel and certified by the court that there was evidence offered and received which tended to prove all of the statements set out in the bill of exceptions. It is further certified that the bill of exceptions contains all of the evidence offered and admitted relevant to or necessary to an understanding of the objections and exceptions.

We therefore submit that if the court shall follow the rule in *Myers vs. United States*, *supra*, the inquiry might well be ended here.

In the *Myers* case the court held that the appellants, having disposed of capital stock upon the representation that the proceeds were to go into the treasury, whereas in truth and in fact the said proceeds were to be used by the vendors for their own purposes, this constituted such a clear case of fraud that an appellate court would not reverse a judgment of conviction except on account of a glaring and obviously harmful error. We quote from page 925 of the opinion:

“A man who plans to dispose of his individual

stock to another by representing that it is treasury stock so that the purchaser will suppose that the money he pays for it will pass directly to the company instead of going into the seller's pocket, has devised a scheme to defraud. When he has effected the sale through such misrepresentations he has defrauded his neighbor. * * * *

Under such circumstances only some glaring and obviously harmful error would justify a reversal."

To the same general effect that where guilt is plain and it clearly appears that the conviction was right, the court will not reverse a case unless error complained of is clearly shown to have been prejudicial, we cite the following additional authorities:

Wesoky vs. United States, 175 Fed. 333.

Morse vs. United States, 174 Fed. 539-544.

Lee Dock vs. United States, 224 Fed. 431.

ASSIGNMENTS OF ERROR I, II AND III.

These assignments are all based upon the action of the court in admitting certain testimony given by the witness Nelson C. Ovatt. As to these assignments of error, the contention of the government is:

1. That the testimony given by Oviatt was admissible;

2. That this testimony became competent by subsequent testimony;

3. That this testimony was admissible for the purpose of showing an intent to defraud;

4. That at the time this testimony was introduced it was competent against the defendant Bilyeu who was then on trial, and when this defendant, at the close of all the testimony, was discharged by the court, his co-defendants should have then requested the court to withdraw it from the consideration of the jury, in the event they then believed that it was inadmissible against them;

5. That on account of the statement made by counsel for the appellants as the same is set out at page 175 and 176 of the transcript of record, the appellants cannot now take advantage of their exception;

6. That there was no motion made by the appellants at the trial to strike out this testimony, for which reason they are not in a position to urge that error was committed;

7. That by carefully prepared requests for instructions, the appellants requested the trial court to limit the effect of certain evidence, which requests were granted by the court; if the appellants had desired the trial court to further limit the effect of the Ovaitt testimony or to take it from the consideration of the jury they should have requested a timely instruction to that effect;

8. That if error were committed by the trial court in admitting this testimony, such error was cured by the instructions of the court;

These eight propositions we will now consider in the order named above:

1. THE TESTIMONY GIVEN BY OVAITT WAS CLEARLY ADMISSIBLE:

The defendants Menefee and LeMonn had inserted advertisements in three newspapers published at Portland, Oregon, and more than 25,000 copies of these advertisements had been sent out through the mail (Transcript of Record, p. 123). These advertisements and each, every and all thereof were full page display advertisements (Transcript of Record, p. 136). A reference to Government's Exhibit No. 64, being a circular letter of date June 21, 1911, written by LeMonn to the salesmen of the company, and Government Exhibit No. 56 being a letter of date October 11, 1911, written by LeMonn to Messrs. Hunter and White, shows that these advertisements were not only inserted in the newspapers, but the papers themselves were forwarded for the purpose of influencing prospective purchasers to buy the stock of the corporation. Among the many false statements contained in these advertisements are the following:

a. The value of the patent rights for the Bilyeu Au-

tomatic Cashier is almost priceless. (Transcript of Record, p. 124).

b. The company is to pay an annual dividend of 100 per cent. (Transcript of Record, p. 125).

c. The United States Cashier Company owns and controls four machines, any one of which would insure big returns, and the future profit of the said company is assured. (Transcript of Record, p. 126.)

d. Methods of handling money will be revolutionized. (Transcript of Record, p. 128).

e. Extensive production of marvelous mechanical brain. (Transcript of Record, p. 128).

f. The machines of the United States Cashier Company promise to outrival the typewriter in usefulness. (Transcript of Record, p. 128).

g. The United States Cashier Company owns the patents to its Change Computing Machine, its Bank Cashier, its Lightning Change Maker, its Currency Paying machine and its New Style Adding Machine. Owning these patents, the future profit of said company is impossible of calculation. (Transcript of Record, p. 129).

h. The United States Cashier Company not only controls one of the above machines, any one of which would return big profits, but owns and controls patents

and rights to all of them. (Transcript of Record, p. 132).

i. These machines are the product of the United States Cashier Company. (Transcript of Record, p. 133).

j. The patent rights of these machines are virtually priceless and the demand for such money saving devices is unlimited. (Transcript of Record, p. 135).

That the proof showed these representations, and each, every and all thereof to be false and untrue, appears in the narrative statement of the bill of exceptions at pages 116 to 119, inclusive. It further appears from the testimony of the witness E. D. Sewall (Transcript of Record, p. 188), that at the time these advertisements were published and mailed the applications for said patents were not then on file.

On September 15, 1911, John F. Robb, the patent attorney for the United States Cashier Company, had written to the defendant Menefee as follows:

“In conclusion, I beg to state that thus far in my infringement research, I have located one patent which is clearly infringed by the use of a certain feature of the change machine. The patent is within five years of expiration, and was granted to a foreigner. It is my purpose to consider carefully the desirability of acquiring the above

patent in order to strengthen your protection, but will advice fully on this subject when I forward infringement report.” (Transcript of Record, p. 165).

On October 5, 1911, the patent attorney had written to the United States Cashier Company as follows:

“I have not received as yet further advices supplementing Mr. Overlin’s night letter answered on the 26th of Sept. You will understand that I was interrupted in the infringement work by instructions in said night letter and would like to know whether the report covering my work completed to date is to be sent or is to be delayed until some further developments? I think this of grave importance because in the infringement search I have run across certain patents controlled by the National Cash Register Company which will affect our computing machine. Indeed, I believe that the portion of my report directed to the above matter may be the most important development of my work because it is probable that a consultation of your mechanical department and the officers of your company may have to be called to determine upon your future operations in the computing machine line. Unless I run across some other patents bearing on this line, the National Cash Register Company people have

protection that may seriously interfere with us.”
(Transcript of Record, p. 165, 166).

Notwithstanding the receipt of this notification relative to infringements it appears from the record that on October 13, 1911, in a circular letter issued by the defendant Menefee he made the following statement:

“We also feel gratified in announcing that we are not only the absolute owners of our patents, but that we have not had the slightest intimation of trouble from any source in the way of infringement or otherwise. The patent office at Washington, D. C., could not give us a single citation wherein our patents were infringing on any other patents previously granted and we have also had made extensive research by the ablest patent attorneys in Washington, D. C., and they have assured us that we have full protection for all time to come.” (Transcript of Record, p. 164).

It further appears from the correspondence set out at page 166 and 167 of the transcript of record that Menefee, in writing to Robb, requested Robb to write a prospective purchaser and tell him that there was no danger of infringement; that Robb wrote the letter to the prospective investor and also immediately wrote Menefee that he could not advise the purchaser that there was no danger of infringement and for this reason had not mentioned the matter at all.

The defendant Bilyeu was a duly licensed and regularly admitted patent attorney (Transcript of Record p. 163), from which fact we may assume that he would realize the danger of trying to put a machine upon the market the manufacture of which would clearly infringe the rights of another. We quote from pages 161, 162 and 163 of the transcript of record:

“And the plaintiff offered testimony which was received and which tended to prove that the American Cash Record Company was a corporation organized and existing under the laws of the state of Washington, and that during all of the times mentioned, specified, stated in the indictment, the defendant, Thomas Bilyeu, was the president and a director thereof, and was the owner of one-fourth of its capital stock; that the United States Cashier Company, on September 28, 1910, purchased from the American Cash Record Company applications for patent No. 555,552; No. 519,489 and No. 522,240, for a purchase price of \$200,000 in cash and \$60,000 of the stock of the United States Cashier Company; that from time to time thereafter and up to and including the year 1913, the United States Cashier Company made many cash payments to the American Cash Record Company and to the defendant, Thomas Bilyeu, and that the defendant

Bilyeu, during these years, received in cash from the United States Cashier Company, on account of said contract, more than the sum of \$50,000; that in November, 1911, the United States Cashier Company purchased from the defendant Thomas Bilyeu certain patent rights covering the same applications for the republic of Mexico for the sum of \$15,000, but that the United States Cashier Company never did anything with any of these rights; that in June, 1912, the United States Cashier Company purchased from the defendant Bilyeu and one Overlin the rights to a currency machine that had been built by Overlin. The consideration of this purchase was that the company was to sell for Bilyeu and Overlin 1600 shares of stock owned by them and to pay them for the stock at the rate of \$12.50 per share.

“There was evidence tending to show that the defendant Bilyeu saw the advertisements in the Oregonian, Journal and Telegram referred to in this bill. The plaintiff offered evidence tending to prove that upon one occasion the defendant Bilyeu had assisted in the sale of the stock of the United States Cashier Company and had represented to the purchaser that the company owned the patents to all the machines which it was advertising and selling. The plaintiff offered evidence tending to prove that during all of the times

mentioned in the indictment the defendant Bilyeu was a duly licensed and regularly admitted patent attorney.

But Mr. Bilyeu, being called as a witness and sworn, denied the foregoing facts, so far as they related to the sale of any stock by Bilyeu.” (Transcript of Record, p. 161, 162, 163).

The portion of the proof quoted above disputed by the defendant Bilyeu was his participation in the sale of some of the capital stock. (Transcript of Record, page 163).

Bilyeu had transferred his alleged patent rights to the United States Cashier Company and had received in cash alone on account of the transfer more than the sum of \$50,000. (Transcript of Record, page 162).

With this statement of the evidence we now proceed to a discussion of the competency and relevancy of the Oviatt testimony as the same is set out in the transcript of record at pages 170 to 184 thereof.

Oviatt testified without objection that he was engaged in the manufacture of a machine called the payograph and was president of the Payograph Company; that he was acquainted with the defendant Bilyeu; that he met him first in the year 1909 in Portland; that he, Oviatt, had devised the principles of a coin paying machine and had disclosed these principles to Bilyeu; that

Bilyeu agreed with him that they would divide the results of the venture, the witness turning over to Bilyeu his ideas and Bilyeu agreeing to proceed with the development of the machine and to build a model thereof.

The purpose of this testimony was explained by the district attorney and his explanation is set out at page 171 of the transcript of record.

The effect of this testimony was by the court limited to the good or bad faith of the defendants. (Transcript of Record, p, 175).

We contend that the testimony hereinabove set out was clearly admissible for the purpose of showing an intent upon the part of Bilyeu to defraud. It tended to prove that he was not the inventor of one of the machines which he sold to his co-defendants. It tended to prove that he knew that whenever an attempt to market this machine should be made that the owner of the application for the patent would undoubtedly experience difficulty with the owner of the Oviatt machine and this, as we will subsequently show in the brief, is exactly what happened.

It must be borne in mind that at the time this evidence was introduced the defendant Bilyeu was on trial, as the court did not direct a verdict in his favor until after all of the evidence had been introduced upon both sides. (Transcript of Record, p, 163).

The remainder of the testimony of the witness Oviatt against which objection is here urged was as follows:

We refer to the transcript of record at pages 178 to 184, inclusive.

Oviatt further testified that he built a machine known as the payograph, the principal feature of which consisted in this: it was a coin paying device connected to an adding machine in such a way that the adding machine could be used either with or without the coin paying mechanism, this being detachable. Upon cross examination Oviatt testified (Transcript of Record, p. 183), that there was an interference in the patent office between the bank cashier of the United States Cashier Company and this device of the Payograph Company. Oviatt's application for a patent upon this feature was filed long prior to the application of the United States Cashier Company. (Transcript of Record, p. 178, 188, 211, 212.)

The defendant LeMonn made a visit east in the early part of the year 1912 and learned of the manufacture of the payograph. (Transcript of Record, p. 176).

By reference to Government's Exhibit No. 162, it is shown that on January 7, 1912, LeMonn wrote Menefee in part as follows:

"There is one thing that I learned from the paymaster, that was of some information as well

as surprise to us, and that is, the Payograph Company, 915 Ford Building, Detroit, are constructing a payograph for pay rolls, etc., and for their registering, printing, and totalling mechanism, they make the claim that this payograph can be used in conjunction with either a Burroughs, Wales or Pike adding machine, by placing the adding machine selected over the key board or mechanism of the payograph, and Mr. Meyers, who had been at Detroit investigating same, seemed to be very favorably impressed with it, and he should know something about it, as they tried out a Twin Brandt machine which they returned, as they could not use it to advantage. It is hardly necessary for me to state that I will make a very thorough investigation of this payograph machine, along the lines of how soon they will be able to market same, the work it will accomplish, and their facilities for manufacturing same, and if it is as good as it seems to be, it may mean that we really have a competitor that is now ready for the market, and if they can use it in conjunction with their adding machine, it should sell as I think they only ask about \$250 for same. This may mean that we will want to talk over the stock selling problem along the lines of this competitor. In other words, don't think it would be wise to have the directors place more of the com-

pany's stock on sale at this time, until we have gotten rid of some of this stock on hand, which we have been forced to buy up, etc."

On January 10, 1912, LeMonn, having seen a demonstration of the payograph (Transcript of Record, p. 179), sent Menefee the following telegram, which was received in evidence and marked as Government's Exhibit No. 163:

"Advance to thirty Monday or twenty second sure Sell all you can of repurchased stock by us Ovaitt is president of payograph machine which being manufactured by contract and looks like winner. Clazon states has positively forty thousand assured for Friday will return to settle deal in Chicago."

It appears from an examination of the corporate minute book of the United States Cashier Company covering that period of time during January, 1912, that the board of directors followed the advice of Mr. LeMonn. It appears from the transcript of record at page 176 that the defendants Menefee and Campbell at Portland, subsequent to the receipt of the telegram hereinabove set out, caused the board of directors of the United States Cashier Company to pass a resolution withdrawing the company's stock from the market and authorizing Menefee, LeMonn and Campbell to sell their own

personal stock with the sales organization and the demonstration machines of the company.

In a letter written by Menefee on June 27, 1913, (see Government's Exhibit No. 367) the statement is made:

“We have known of this payograph proposition for the last three years and also have had quite full and complete information in regard to its state of development and also the design.”

From the above statement it clearly appears that Menefee knew of the payograph machine at least as early as June, 1910. Then at the time the advertisements were inserted in the papers he knew that the United States Cashier Company had a dangerous competitor, and that the payograph machine would, in all human probability, stand as an absolute bar to the financial success of the company of which he was president.

The rest of the testimony of Ovaitt is in relation to his dealings with the defendants Bilyeu and Menefee and the attempt made by these defendants in the year 1913 to purchase from him the patent rights of the payograph to the end that infringement proceedings might be avoided.

Menefee, LeMonn, Campbell, Bonnewell and Todd were engaged, during all of these times, in the sale of the capital stock of the United States Cashier Company

at exorbitant prices to the public. The company could not hope for success unless it were permitted to have a monopoly upon the sale of its machines. Menefee and Bilyeu knew that the owners of the payograph machine could prevent the manufacture and sale of the machine of the United States Cashier Company. Knowing this state of facts Menefee proceeded to defraud the public by continuing to sell the stock of the United States Cashier Company and when they faced the stern realization that the payograph was about to go on the market, Bilyeu, having known of the danger since 1909, and Menefee, having known of it since 1910, the directors proceeded without a thought of the interests of the other stockholders, to unload their own personal holdings.

The indictment alleged (Transcript of Record, p. 27, 28) and the proof showed (Transcript of Record, p. 122, 123), that the conspiracy was to and did continue from January 1, 1910, to January 1, 1915.

Under any view of the evidence, the testimony given by the witness Ovaitt was clearly admissible.

That the payograph machine did present a serious obstacle to the success of the United States Cashier Company, if said company had ever intended to manufacture or sell their machines is conclusively shown in the letter written by Robb to Menefee of date October 17, 1913. This letter was introduced in evidence by the appellants, is marked as Defendant's Exhibit I-3-h, and is made a

part of the bill of exceptions by the stipulation and order of date March 23, 1916. This letter is as follows:

“In Bilyeu’s telegram he suggests that you advise me of Oviatt’s methods. To tell the truth I only know of Oviatt’s existence through Mr. LeMonn, who told me about his Detroit company, early in 1912. I had the impression at that time that LeMonn indicated that Oviatt was the first man to propose the idea of the combination of a paying machine with an ordinary adding machine so the two could operate conjointly or independently. One thing is true, according to the English patent of Oviatt, he claims a filing date for his U. S. application as of August 31, 1911, almost a year ahead of us. The burden will therefore be on us to beat him out in this country even and the indications are that we would fail unless we really can prove that Oviatt stole the idea from us. * * * Nowwithstanding that Mr. Bilyeu suggests an under-estimation of Oviatt’s English patent. I cannot agree with his position. I do not think that Oviatt’s machine is a commercial machine, yet I have contended before the patent office and indicated to you that I considered the broad claims on the idea of our combination machine, and Oviatt’s equivalent machine to be of tremendous importance and

value. For me now to agree with Mr. Bilyeu would be absolutely inconsistent with my previous position and with my honest beliefs in the premises. Owing to my legal experience, I am not so much concerned with the commercial feasibility of Oviatt's machine as I am with the fact, on your behalf, that he has the broad claim which covers our cashier machine. This claim reads as follows:

“ ‘A combination machine characterized in that it is so connected to a calculating machine that by means suitably connected rods adapted to be coupled and uncoupled, the paying and calculating machine can be utilized both conjointly as a unitary structure, and separately, as two independent machines.’

“Now I will quote my first and perhaps broadest claim in our English application in controversy:

“ ‘A calculating and money handling machine in which the calculating mechanism is a complete machine in itself, operable independently of the money handling mechanism, characterized by the provision of means to cause conjoint operation of the calculating and money handling instrumentalities, or operation of the calculating means alone.’

“True, my claim is couched in possibly broad-

er terms, but it will be evident to you that Oviatt's attorney and myself were covering the identical same principle. In our case we have about twenty-five claims while Oviatt got eight or nine. This is not very material because the thing of crucial import is the broad claim.

"Thus it is that I am convinced more and more as I think over this matter that we could be certainly embarrassed if we attempted to argue to your Londoners that Oviatt's machine covers an uncommercial and general idea when from the patentable standpoint of protection such a proposition cuts no ice whatever."

Note the statement in the letter:

"The burden will therefore be on us to beat him out in this country even and the indications are that we would fail unless we really can prove that Oviatt stole the idea from us."

This statement would of itself make the Oviatt testimony admissible.

The objection of the appellants to the Oviatt testimony seems to be directed to the fact that in the indictment there is no specific negative to the alleged falsity of the representation made by the appellants that the Cashier Company owned the patent to the bank cashier machine; at the trial the appellants attempted to take

advantage of this point and to prevent the introduction of any proof to the effect that the Cashier Company did not in fact own any patent to this machine. It has been held by the appellate court of this circuit that it is not necessary to negative a specific allegation of falsity in a mail fraud indictment.

EWING VS. U. S., 136 FED. 53-56.

The same objection was made in this case; in ruling upon this question Judge Gilbert, speaking for the court said:

“The indictment alleges that the representations were false and untrue in fact, and were well known by the said defendants to be utterly false and untrue in fact. This, it is said, is a mere statement of a conclusion of law and is not sufficient
* * * The defendant should not be permitted to escape the just penalty of the law through defects of form, if such defects there were, which could not have prejudiced him. These considerations alone are sufficient to dispose of such an objection made for the first time in an appellate court. But we find no defect in the indictment in the respect specified. It is true, and counsel present authorities which so hold, that in drawing an indictment for an offense the substance of which is matter falsely sworn to, or fraud perpetrated by means of matter falsely represented, it

is necessary to allege not only that such matter was false, but the pleader must go further and allege the truth as it is in the facts. But here the gist of the offense is not the obtaining of money by means of false representations. It is a scheme to use the mails of the United States in furtherance of a purpose to defraud, and an act done to carry out the same. It was such use of the mails that the statute was intended to prevent. The fraud contemplated by the law need not necessarily be a fraud at common law or by statute."

Applying this rule of law to the case at bar, the testimony of Mr. Oviatt, notwithstanding the fact that the indictment failed to specifically negative the ownership of the bank cashier machine, was admissible. The indictment in this respect bears so close a relation to the one analyzed by Judge Gilbert in the case last above quoted that no material distinction can be drawn between the two. The allegation in the indictment in the case at bar is as follows: (Transcript of Record, p. 13).

"The said defendants * * * * would falsely and fraudulently and by means of printed advertisements, to be by the said defendants * * * inserted in newspapers * * * and by words to be orally spoken by the said defendants * * * represent, pretend and promise that the said corporation * * * owned the pat-

ents to a certain * * * bank cashier machine."

In the case of **MORRIS vs. UNITED STATES**, 229 FED. 516-520, the court said:

"The tendency of most of the courts at this date and especially the Supreme Court of the United States, is to disregard technicalities which can in no way be prejudicial."

The argument of learned counsel for the appellants (Appellants' brief, pp. 60-64, inclusive) is interesting and impressive for two reasons: The earnest and decisive manner of its presentation and the recognized and admitted ability of the lawyer who advances it. Without these two qualities it would seem devoid of merit. It presents the following theory:

The allegation of representation of ownership of the bank cashier not being specifically negatived, the Cashier Company by this allegation becomes the owner of a patent which was never issued, whereas without the said allegation the company would not have owned it. The answer to this is that the Cashier Company in truth and in fact did not own any patent to this machine and no patent has ever issued. As the entire argument is based on this false premise it establishes nothing except that counsel for appellants is both earnest, ingenious and resourceful.

2. THE EVIDENCE GIVEN BY THE WITNESS OVIATT WAS MADE COMPETENT BY SUBSEQUENT TESTIMONY:

If the court should be of the opinion that the evidence of Oviatt, at the time it was offered, was incompetent, then its close connection between the subsequent testimony set out in the transcript of record at pages 181 to 182 would render the testimony admissible and its admission not error.

We cite the following authorities in support of this contention:

The case of *St. Clair vs. United States*, 154 U. S. 134, 149, was a case wherein three defendants were jointly charged with the crime of murder.

Evidence relating to the acts, appearance, and declarations of two of the defendants was admitted over the objection that the defendants were not charged as co-conspirators. The Supreme Court said:

“The evidence is not, for that reason, to be rejected. * * * The acts, appearances, and declarations of either, if part of the *res gestae*, were admissible for the purpose of presenting to the jury an accurate view of the situation as it was at the time the alleged murder was committed. Circumstances attending a particular transaction under investigation by a jury, if so in-

terwoven with each other and with the principal fact, that they cannot well be separated without depriving the jury of proof that is essential in order to reach a just conclusion, are admissible in evidence.”

The case of *Jones vs. United States*, 179 Fed. 584-604, is the famous criminal case arising from Oregon against Willard Jones, et al. Evidence competent and relevant against one of the defendants was objected to because it tended to establish another offense on the part of the defendant, but the court held that the testimony did not become inadmissible on account of that fact.

In the case of *Sprinkle vs. United States*, 141 Fed. 811-816, five defendants were jointly indicted for a violation of the internal revenue laws; the court, in passing upon objection to evidence given as to the separate conduct of individual defendants, said:

“Ought not the acts, conduct, and doings of each of the defendants—not their statements, declarations, or admissions necessarily, but what they or either of them may have done—in and about any material transaction forming a necessary part of the business in hand, whereby the Government was defrauded of its revenue, manifestly be submitted to the jury, with a view of determining the bona fides of their acts; that is,

their intent in the premises? They should, of course, be the necessary incidents of the litigated act, and such acts, incidents and doings as are necessarily and unconsciously associated with the crime as committed.”

3. THE TESTIMONY WAS ADMISSIBLE FOR THE PURPOSE OF SHOWING AN INTENT TO DEFRAUD:

This testimony shows that Bilyeu defrauded the public as it appears that notwithstanding the fact that he saw the false advertisements in all the newspapers he permitted the sale of the capital stock of the United States Cashier Company to proceed unchallenged, taking his toll to the extent of \$50,000 in payment of alleged patent rights which were never his. (See Transcript of Record, pp. 162-163).

4. NO ERROR WAS COMMITTED BECAUSE NO REQUEST WAS MADE OF THE COURT TO LIMIT THE EFFECT OF THE OVIATT TESTIMONY BY PROPER INSTRUCTION TO THE JURY:

This contention we believe is unanswerable. Bilyeu was on trial at the time the testimony was introduced; undoubtedly the testimony was admissible as to him, and if his co-defendants had desired to have the effect of the testimony limited, the court should have been asked by timely request to have so limited it.

If it should be contended that Oviatt's testimony became inadmissible by reason of the fact that the court subsequently held that Bilyeu was not a conspirator, the defense cannot now complain because they did not ask the court to limit the effect of the testimony by proper instruction to the jury.

Van Deusen vs. United States, 151 Fed. 989-992.

This was a mail fraud case. The court permitted to remain in the record the remark of a witness, the greater portion of whose testimony was excluded, such remark not being responsive to any question and not having been called to the attention of the court except by a general motion at the close of the case to strike out all of the testimony of the witness. The refusal of the court to strike out all of this testimony was urged as a reason for reversal.

In this connection the court said:

"But the attention of the court was not specifically called to this portion of the witness's testimony. The motion to strike out was to strike out the whole of the witness's testimony. Presumably, had this remark of the witness—a remark as already stated wholly irresponsible to any inquiry put—been called to the attention of the court, as something still standing in the record, a

motion to strike it out would have prevailed; for the court's mind on that subject had already been twice indicated. Nor can we infer that this testimony was referred to subsequently during the course of the trial; for in that case the court doubtless would have stricken it out as the other statements were stricken out. So that, these being the circumstances, the matter now objected to appears to have been one of those occurrences, that in a trial of considerable length are lost sight of, and exert no final effect upon the verdict—matters raked out of the record only under the closer inspection that preparations for a court of review brings on.

Now when a writ of error is predicated upon matter appearing in the record like this, the party who brings the writ must show that he has been reasonably specific in calling it to the attention of the trial court. He cannot be permitted to bring such matters to the surface for the first time in the court of review. That would be unfair, both to the court that tried the case, and to the general administration of criminal justice.”

To the same effect is the case of *Tevis vs. Ryan*, 233 U. S. 273-288-289. The Supreme Court in this case had before it an action in which the plaintiffs were suing for damages. The lower court admitted in evidence a writ-

ten admission which contained certain insinuations and veiled charges of fraud to which the defendants took objection and exception. The court said:

“It is sufficient, however, to say that the paper was introduced as evidence of a demand and was admissible for that purpose (in the absence of objection based on the time of its delivery) since it contained a notice that plaintiffs insisted that defendants should comply, as well as might then be done, with the provisions of the agreement. The fact (if it were a fact) that it also contained matters irrelevant to the demand, would not render the document inadmissible. *The proper course would have been for defendants to request an instruction limiting the effect that should be given to it by the jury; or, if intending to insist that it came too late to constitute a proper demand, then to exclude the paper from consideration. The present objection was not properly raised at the trial.*” (Italics ours.)

The case of *C. Vt. R. Co. vs. Soper*, 59 Fed. 879-889, is an action at law by Soper against the railroad company for loss of a quantity of grain. The court in commenting upon an objection and exception taken to certain testimony admitted on the part of the plaintiff said:

“It is frequently the right and the duty of the trial court to admit evidence which, when ad-

mitted, is not apparently relevant, upon the assurance of counsel that it will afterwards be connected. This relates to the order of a trial, but does not deprive the party against whom the evidence is offered of his just rights with reference to it. He may object to it on the ground of irrelevancy at the time it is offered, and, if not afterwards connected, move to have it stricken out; and, if not stricken out, he, by thus seasonably objecting at the outset, and seasonably renewing his objection, secures to himself a legal right to exceptions. * * * But there is nothing in the bill showing that the defendant below subsequently called the attention of the court to it anew; so that this statement in the bill is wholly ineffectual.”

The case of **Alexander vs. United States**, 138 U. S. 353-355, was a murder case in which error was assigned to the ruling of the court limiting the number of challenges in drawing the jury. The defendant having made no objection at the time, the court, in defining the duty of counsel in this respect said:

“But the decisive answer to this assignment is, that the attention of the court does not seem to have been called to it until after the conviction, when the defendant made it a ground of his motion for a new trial. It is the duty of counsel

seasonably to call the attention of the court to any error in impanelling the jury, in admitting testimony, or in any other proceeding during the trial by which his rights are prejudiced, and in case of an adverse ruling to note an exception.” (Italics ours.)

The case of *Itow vs. United States*, 223 Fed. 25-28, is a case recently decided by the Circuit Court of Appeals of this circuit and seems to us to be decisive. This was a murder case originating in Alaska. There were two defendants convicted. During the trial the court admitted in evidence a statement made by one defendant to the district attorney concerning circumstances surrounding the death of the decedent. This was assigned as error for the reason that it was not made in the presence of his co-defendant, and therefore was not competent against him. The prosecutor stated that he was only offering the evidence against the party making the admission, and the court held it to be admissible for that purpose. Notwithstanding the fact that the alleged error was not properly submitted to the court for which reason it might have been entirely disregarded, the court, on account of the importance of the case, examined carefully into the merits of the assignment and ruled as follows:

“In such a case it is held that the court should instruct the jury to regard the statement as evidence against the defendant who made it, and

not against his co-defendant, and it has been held that, if the other wishes to be relieved from the influence of such evidence, he should ask for instruction limiting the effect thereof. In this case there was no request for such an instruction. We think there was no error in the admission of the statement for the purpose for which it was offered."

5. WHATEVER OBJECTION THE DEFENDANTS EVER MADE TO THE INTRODUCTION OF THE OVAITT TESTIMONY WAS WAIVED BY THEM AT THE TRIAL:

For the purpose of showing the exact manner in which the objection was made, the ruling of the court thereon, and the consent of these defendants thereto, we quote from the transcript of record at page 175:

"Whereupon the Court ruled upon the said objection in the following language: 'I think in view of the indictment, that it must be conceded, for the purpose of this trial, if there was a patent, that the company had a patent to this particular machine. Further than that, I don't suppose in this trial that the validity of the patent that has been issued by the Government can be tried or determined. There is evidence in this case tending to show that Le Monn made a visit east along in 1912, and learned of this particular instrument,

and that it was being manufactured, and that he sent certain letters and certain telegrams to Mr. Menefee with reference to this matter, and advised a certain course of procedure, which the evidence shows the company subsequently took, and for that purpose, I think this testimony of their connection with this patent is material in this case, to show their good faith.'

"Thereupon counsel for the defendants said: 'I am content with this limitation, that these two matters will be instructed to the jury that the patent is (not) in controversy.'

"And the Court said: 'In this case I understand it is admitted in the indictment.'

"And thereupon Mr. Reames said to the Court: 'Before your Honor passes finally upon that, I would like to leave that part and pass on a little further, and offer it again this afternoon, and offer some authority upon it.'

"Whereupon the Court said: 'You can go on with the testimony, and later if it should be deemed material you can present the force and effect of it, but with that limitation, it will be admitted at this time.' "

Defendants at the trial thus waived by a statement

solemnly made in open court the right to rely upon the objection which is now urged.

6. NO MOTION BEING MADE TO STRIKE OUT THE OVAITT TESTIMONY THE DEFENDANTS CANNOT NOW CLAIM THAT IT WAS INADMISSIBLE:

We believe that the above proposition of law is elementary; especially should this rule be invoked where the evidence was admitted following the statement set out on pages 175 and 176 of the transcript of record.

Van Deusen vs. United States, 151 Fed. 989-992.

Tevis vs. Ryan, 233 U. S. 273-288-289.

Alexander vs. United States, 138 U. S. 353-355.

Itow vs. United States, 223 Fed. 25-28.

7. THE DEFENDANTS HAVING REQUESTED THE COURT TO LIMIT THE EFFECT OF CERTAIN EVIDENCE, THEIR FAILURE TO MAKE THE REQUEST REGARDING THE OVAITT TESTIMONY WOULD JUSTIFY THE COURT IN NOT CALLING SPECIAL ATTENTION TO THE MATTER:

The defendants' request for instructions are set out at pages 231 to 235, inclusive, of the transcript of record. An examination of these requests will disclose that the

defendants did ask in several instances, to have the effect of certain testimony relative to the patent situation limited in its scope; the court was justified in assuming that in those cases wherein the defendants desired to have the effect of the testimony limited, proper request had been made therefor, for which reason no request having been made to limit the effect of the Ovaitt testimony, no such instruction was desired by the defendant.

Van Deusen vs. United States, 151 Fed. 989-992.

8. ASSUMING FOR THE PURPOSE OF THE ARGUMENT THAT ERROR WAS COMMITTED IN THE ADMISSION OF THE OVAITT TESTIMONY, THIS ERROR WAS CURED BY THE INSTRUCTIONS OF THE COURT:

The following instruction was given by the Court to the jury: We quote from page 261 of the transcript of record:

“One cannot be made a member of a conspiracy except by his own acts or declarations, and the acts and declarations of another are not evidence against him.”

Hereafter in this brief in discussing the effect of the instruction given by the court withdrawing from the consideration of the jury the testimony of the witness

Sewall, we have cited authority which also supports the above proposition of law.

In the brief of the appellants which has just been submitted to us, it is urged that the admission of the Ovaitt testimony was prejudicial error; it is clear that counsel for the appellants have entirely overlooked and disregarded the fact that the indictment alleged (Transcript of Record, p. 27 and 28) and the proof showed (Transcript of Record, p. 122) that it was a part of the conspiracy that it should and would, and that in fact, it did, continue from September 1, 1910, until and including January 1, 1915, during all of which times it was continually in existence and in operation, and that during all of said times, the appellants continued to feloniously conspire, combine, confederate and agree together to commit the crime in the indictment set forth in detail.

Thus, it was alleged in the indictment and substantiated by proof that prior to, at the time of, and long subsequent to the visit of the defendant LeMonn, at the office of the Payograph Company; to the sending and receipt of his fraudulent telegram, and the action of the board of directors thereon; to the meeting of Menefee and Ovaitt; to the meeting of Menefee, Ovaitt and Bilyeu, and to the explicit notice given by Mr. Robb in his letter to Menefee of date October 17, 1913 (Defendant's Exhibit I-3-H), in which Mr. Menefee was told

plainly that with the payograph machine as a competitor for a patent the Cashier Company could not succeed; that these appellants continued to defraud the public by selling the stock of the United States Cashier Company upon the false representations that it owned the patents to its machines when in truth and in fact it did not; that the patents were priceless when they knew them to be worthless, and that the company was engaged in the business of manufacturing and selling machines notwithstanding the charge in the indictment and the proof at the trial that the business of the company was to sell and dispose of its capital stock. For these reasons alone, it was competent that the jury should know the entire history of the transaction.

ASSIGNMENTS OF ERROR IV TO XVI INCLUSIVE.

These assignments are all based upon the ruling of the court in admitting certain testimony given by the patent expert, E. D. Sewall, to the effect that there had been issued by the United States patent office patents which would be infringed by the subsequent applications of the United States Cashier Company, and that said company had notice of the infringement. It is our contention that this testimony was competent and that no error was committed in receiving it, yet we respectfully suggest that the appellants are not in position to now

urge these assignments of error, because the court, upon their request so to do, withdrew said testimony from the consideration of the jury.

The appellants requested the court to instruct the jury as follows:

“The fundamental question in this case is the good faith of the defendants in respect of the enterprise of manufacturing and selling the machines described in the indictment and in the evidence. If they honestly intended to establish a business to manufacture and to sell the machines, in the belief that the business would be profitable to the corporation and its stockholders, you cannot find them guilty of the charge in this indictment that the United States Cashier Company was not engaged in either the business of manufacturing or selling said machines or any thereof.” (Transcript of Record, p. 232.)

And the appellants further requested the court to instruct the jury as follows:

“You cannot decide in this case that the patent of Osborne or Lindelof or Cook dominated or affected injuriously any patent issued Bilyeu and Potter, or claims allowed by the Patent Department of the United States to the defendants or the United States Cashier Com-

pany or which were assigned to said Company.”
(Transcript of Record, p. 232.)

And the appellants further requested the court to instruct the jury as follows:

“Any representations made by the defendants that they had procured a patent that they did in fact procure or had claims allowed that were in fact allowed, cannot be found by you to be a misrepresentation.” (Transcript of Record, p. 232, 233.)

And the appellants further requested the court to instruct the jury as follows:

“Bad faith or fraudulent misrepresentations cannot be imputed to defendants in respect of patents they in fact procured or in respect to claims that were in fact allowed because of claims of infringement of prior patents by other persons that were made or might be made, and there is no competent evidence in this case that any such infringement in fact exists.” (Transcript of Record, p. 233.)

And the appellants further requested the court to instruct the jury as follows:

“In respect to the last instruction, I instruct you that the opinion of the witness Sewell that the Osborne patent dominated the construction

of the defendants' patent or machines constructed thereunder, is not competent evidence in this case that any such infringement in fact exists." (Transcript of Record, p. 233.)

And the appellants further requested the court to instruct the jury as follows:

"Honest mistakes or errors of judgment in respect of patents or patent claims or patent situation cannot be imputed to defendants as evidence of bad faith or of a fraudulent purpose." (Transcript of Record, p. 234.)

And the appellants further requested the court to instruct the jury as follows:

"There is a presumption of law when patent is issued by the Department that it does not infringe any prior patent." (Transcript of Record, p. 234.)

And the appellants further requested the court to instruct the jury as follows:

"Expert evidence is not competent to rebut the prima facie presumption that the patents obtained by the defendants and the Cashier Company do not infringe the prior patents mentioned in the evidence, and you are to disregard the evidence of Mr. Sewall to that effect, and you are to find in accordance with the prima facie pre-

sumption that the said prior patents are not infringed by any of the patents obtained by the defendants and the Cashier Company." (Transcript of Record, p. 235.)

And the appellants further requested the court to instruct the jury as follows:

"The issuance of a patent by the Department is a decision of the officers of the Department charged with that duty, that the patent does not infringe any prior patent and the patentee, in accepting the patent, is not thereby guilty of bad faith, but on the contrary his good faith must be presumed." (Transcript of Record, p. 235.)

The appellants did not except to the action of the court in failing to give any of these requested instructions to the jury, and that said requested instructions were all given is shown by the following:

The court instructed the jury, in part, as follows:

"But if at the time these representations were made the company did in fact have patents, issued by the Patent Office of the United States, for any of the machines, the representations, so far as that particular machine was concerned, would not be false. Bad faith or fraudulent misrepresentations cannot be imputed to the defendants in respect of patents in fact issued, and

owned by them, or in respect to claims that are in fact allowed, because of some alleged infringement. There is a presumption of law that, where a patent is issued by the United States Patent Office, it does not infringe any known patent, and a patentee in accepting such patent is not thereby guilty of bad faith. You are not called upon to decide in this case whether the patents issued or the claims allowed were in fact an infringement of some invention or patent, or were dominated or affected injuriously by the Osborne and Lindelof or the Cook patents, or any previous invention, and the evidence of the witness Sewall to that effect should be disregarded. The question on this branch of the case is, were the representations made by the defendants, if any, concerning the patent situation false and made in bad faith, with a fraudulent intent to deceive purchasers of stock in or of the company, or were they made in good faith, with an honest belief in their verity? A representation to be fraudulent must not only be false, but must have been made in bad faith and with a fraudulent intent to deceive, to the injury of the person to whom the representations were made. Honest mistakes or errors of judgment in regard to these matters, or any matters involved in this case, or statements inadvertently made, without a fraudulent pur-

pose, even if material, are not fraudulent. As I understand the testimony, it is admitted that at the time the advertisements were inserted in the newspapers, the company did not own patents to all the machines therein enumerated, and whether those representations that they did own patents to machines to which they had no patents, if such representations were in fact made, were fraudulent and made for the purpose of deceiving purchasers of stock is a question for you to determine from the testimony in this case." (Transcript of Record, p. 247, 248, 249.)

And the court also instructed the jury as follows:

"Respecting the charge of the false representations regarding the enterprise of manufacturing and selling the machines mentioned in the indictment and the evidence, if the defendants honestly and in good faith intended to establish a business to manufacture and sell the machines, in the belief, as the situation then appeared to them, that it would be profitable to the company and its stockholders, you cannot find them guilty of the charge that the company was not intending to engage in either the business of manufacturing or selling such machines." (Transcript of Record, p. 249, 250.)

And the court also instructed the jury as follows:

“The statute which it is charged the defendants conspired to violate includes everything designed to defraud by false and fraudulent representations as to the past or present, or suggestions and promises as to the future, and the significant fact in this case is the intent and purpose of the defendants in making the representations charged in the indictment, if they were in fact made. The question for your determination is not whether the business which the defendants were engaged in promoting was a legitimate business, or was practicable or not. If the corporation, and the defendants as officers and agents thereof, entered in good faith upon the business, believing that the representations made by them, or to be made, were true, and that they could and would earn enough to justify the promised returns on the investment, they should not be convicted, no matter how visionary you may consider their plans. Their good or bad faith in these matters is to be determined, and their several acts and declarations construed and interpreted, by conditions as they existed at the time the statements and declaration were made, and as they appeared to the defendants at that time, and not by the final result of the enterprise, or from present conditions.” (Transcript of Record, p. 250, 251.)

In the case of *Krause vs. United States*, 147 Fed. 442-451-452, the defendants had been convicted of unlawful enclosure of public lands. The prosecutor had prevailed on the court to permit the admission of certain evidence on the promise that it would be connected up. This testimony was admitted over objection that it was highly prejudicial to the defendants in that it showed that one of them had killed a person in a quarrel in connection with the unlawful fencing. The court in its instructions told the jury not to consider this evidence as a part of the case and to treat it as though it had never been admitted in evidence at the trial. In reviewing this situation where prejudicial evidence erroneously admitted had been taken from the consideration of the jury by the instructions of the court, the case of *Pa. Co. vs. Roy*, 102 U. S. 451-459 was cited and quoted as follows:

“The charge from the court that the jury should not consider evidence which had been improperly admitted, was equivalent to striking it out of the case. The exception to its admission fell, when the error was subsequently corrected by instructions too clear and positive to be misunderstood by the jury. The presumption should not be indulged that the jury were too ignorant to comprehend, or were too unmindful of their duty to respect, instructions as to matters peculiarly within the province of the court to de-

termine. It should rather be, so far as this court is concerned, that the jury were influenced in their verdict only by legal evidence."

The opinion further states that this rule has been followed in the case of *Tubbs vs. United States*, 105 Fed. 59, and *Hopt vs. Utah*, 120 U. S. 430-438.

In the case of *Francis vs. United States*, 152 Fed. 155-157, being an appeal from a conviction for conspiracy to use the mails to defraud, a conversation between a witness and one not a party to the record was erroneously admitted; the court, in its instructions, had said:

"I might right here say to you, you should leave out of any consideration whatever the conversation related by Senator Bradley with the witness * * * because it now appears there were no letters mailed after that conversation, so that you will not take that into consideration at all."

The appellate court held that this instruction was equivalent to striking out the testimony. It would seem from this decision that for a court to strike out any testimony erroneously admitted, it would not be necessary to do so in explicit terms, but that if the effect of the instruction would be to strike out such testimony that would be sufficient. In the case at bar, among the many

instructions given by the court upon this point and hereinbefore quoted, appears the following:

“Bad faith or fraudulent misrepresentations cannot be imputed to the defendants in respect of patents in fact issued and owned by them, or in respect to claims that are in fact allowed, because of some alleged infringement. There is a presumption of law that where a patent is issued by the United States Patent Office it does not infringe any known patent and a patentee in accepting such patent is not thereby guilty of bad faith. You are not called upon to decide in this case whether the patents issued or the claims allowed were in fact an infringement of some invention or patent, or were dominated or affected injuriously by the Osborne and Lindelof or the Cook patents, or any previous invention, and the evidence of the witness Sewall to that effect should be disregarded.”

We submit with confidence that if this instruction were the only one given by the court to the jury in which the rights of the appellants in regard to the patent situation were protected, that it would cure any alleged error in the admission of the Sewall testimony.

The only objection made to the Sewall testimony was on the ground that the question of the validity of the claims or patents of the Cashier Company should not be

tried out in this case. There is no objection made as to the relevancy or materiality of the testimony so far as it might go to any other question in the case. The instructions given by the court were as requested by the appellants. It follows that the defendants cannot now complain if the court did not instruct the jury more clearly or in a more specific manner upon this point than they requested. As authority upon this point we cite the following cases:

Eastern Oregon Land Co. vs. Cole, 92 Fed. 949-952.

This was a case decided by the ninth circuit and was affirmed by the Supreme Court in a *per curiam* decision.

New York, etc., R. R. vs. Madison, 123 U. S. 524-525.

Hopt vs. Utah, 120 U. S. 430-438.

Francis vs. United States, *supra*.

Krause vs. United States, *supra*.

Horn vs. United States, 182 Fed. 721-740.

All of the requested instructions of the appellants relative to the question of infringement were given by the court to the jury; in some instances the phraseology of the requested instructions was changed. It is our contention that if the court had refused to give the substance of all of these requested instructions to the jury that its

refusal would not have been error, but that, on the contrary, the testimony of Mr. Sewall was competent, relevant and material. However, the court did give the instructions, and we submit that they were more favorable than the appellants had any right to expect.

We are so confident that this court will hold that the appellants cannot now take advantage of the questions raised by these three assignments of error, that we approach a discussion of the competency of the testimony of Mr. Sewall with the feeling that any prolonged argument on this point would be superfluous, yet the record presents such firm ground for the admission of this testimony that we ask the indulgence of the court in calling its attention to certain matters in the record.

In beginning this discussion we desire to direct the attention of the court to the fact that the appellants in presenting these assignments of error have included in the statements contained therein a great deal of testimony received without objection, all under the general statement that the court erred in admitting it. We assume that this was inadvertently done by counsel for the appellants and only for the purpose of complying with the rule which requires that a statement of the testimony must be included in the assignment for the purpose of showing the manner in which the question arose. We mention this so as to call the attention of the court to the fact that in order to get a correct understanding of the

merit of these assignments it will be necessary to read that portion of the transcript containing the evidence of E. D. Sewall, between pages 184 and 231 of the transcript of record.

THE TESTIMONY GIVEN BY THE WITNESS SEWALL WAS COMPETENT AND ADMISSIBLE:

As shown upon pages . . . ⁴⁷ . . . to . . . ⁴⁹ . . . of this brief, the defendants Menefee and LeMonn had inserted advertisements in three newspapers published in Portland, Oregon, in which advertisements there were contained ten wilful and deliberate false representations; as shown on pages 163 to 168, inclusive, (Transcript of Record), the defendants LeMonn and Menefee had for the purpose of inducing prospective purchasers to purchase the stock of the United States Cashier Company represented to said prospective purchasers in writing, that the United States Cashier Company had never had any notice of any alleged infringement of the patents of said company, whereas in truth and in fact these representations and each, every and all thereof were deliberately false and untrue, and known to be false and untrue by the said two defendants at the time said representations were made.

In addition to this it appears from an examination of defendants' exhibit I-3-d (letter from Menefee to Robb of date February 26, 1912); defendants' exhibit

I-3-e (letter from Robb to Menefee of date March 4, 1912; defendants' exhibit I-3-f (letter written by Robb to Welky, under date of March 4, 1912, copy of which was enclosed to Menefee); that the defendant Menefee had written to Robb requesting that a letter be written to Emil Welky to the effect that the United States Cashier Company had complete protection upon its patents; that Robb wrote to Welky as requested, gave him a glowing account of the patent situation of the company, but refrained from saying anything about the question of infringement, and that he sent a copy of this letter to Menefee explaining that the reason he could not consistently advise Welky that there was no danger of infringement was that such statement would not be true. These exhibits introduced by the defendants during the time that the government was putting in its case in chief are all made a part of the bill of exceptions by a separate stipulation and order of date March 23, 1916. It further appears from the evidence given by Mr. Sewall that he was clearly qualified to testify as an expert in patent matters. That at the time the applications for patent of the United States Cashier Company were filed the company had notice and knowledge given to it by the patent department that certain prior issued patents would be infringed by said applications.

It appears that, notwithstanding all of these notifi-

cations relative to the danger of infringement which must have brought home to Menefee and LeMonn the knowledge that the computing machine could not be manufactured and sold by the United States Cashier Company, these two defendants continued to exploit the computing machine and to send a model thereof all over the country for the purpose of influencing the sale of stock.

It is shown by reference to the following letters and telegrams that Menefee and LeMonn and all of the sales agents were exploiting the computing machine long subsequent to this notice of infringement and that the model of the computing machine was being used by the salesmen for the purpose of influencing the sale of stock at times long subsequent to the date when Menefee and LeMonn had explicit notice to the effect that the United States Cashier Company could never market for sale its claimed invention:

Letter written by LeMonn to Mrs. Armstrong, of date November 4, 1911. (Government's Exhibit No. 311);

Letter written by LeMonn to Griffith and Graham of date December 7, 1911 (Government's Exhibit No. 312);

Letter written by Menefee to Hunter and Hopson of date January 2, 1912 (Government's Exhibit No. 313);

Letter written by Hunter and Hopson to Menefee of date January 11, 1912 (Government's Exhibit No. 314) ;

Letter written by Menefee to E. E. Amsden, of date January 13, 1912 (Government's Exhibit No. 315) ;

Telegram from Hunter and Hopson to the United States Cashier Company of date January 19, 1912, (Government's Exhibit No. 316) ;

Letter written by Menefee to E. E. Amsden of date January 22, 1912, (Government's Exhibit No. 317) ;

Letter written by LeMonn to Malthouse of date February 3, 1912, (Government's Exhibit No. 318) ;

Letter written by LeMonn to Hall of date February 7, 1912, (Government's Exhibit No. 319) ;

Letter written by LeMonn to Hall of date February 7, 1912, (Government's Exhibit No. 320) ;

Letter written by LeMonn to F. E. Hall of date February 21, 1912, (Government's Exhibit No. 321) ;

Telegram sent by LeMonn to H. E. Malthous of date March 1, 1912, (Government's Exhibit No. 322) ;

Telegram from the defendant Bonnewell to the United States Cashier Company of date March 7, 1912, (Government's Exhibit No. 323) ;

Letter written by LeMonn to Mrs. A. W. Armstrong of date March 8, 1912, (Government's Exhibit No. 324) ;

Letter written by Menefee to Hunter and Hopson of date March 14, 1912, (Government's Exhibit No. 325) ;

Letter written by Menefee to all salesmen of date March 14, 1912, (Government's Exhibit No. 326) ;

Telegram sent by LeMonn to Hopson of date March 22, 1912, (Government's Exhibit No. 327) ;

Letter written by LeMonn to Moore and Murraine of date April 30, 1912, (Government's Exhibit No. 328) ;

Telegram sent by Hunter and Hopson to LeMonn of date May 12, 1912, (Government's Exhibit No. 329-A) ;

Telegram sent by Menefee to Hunter and Hopson of date May 13, 1912, (Government's Exhibit No. 329-B);

Telegram sent by Menefee to Hunter and Hopson of date May 14, 1912, (Government's Exhibit No. 329-C);

Telegram sent by Davidson to Menefee of date July 27, 1912, (Government's Exhibit No. 330-A);

Telegram sent by Menefee to Davidson of date July 27, 1912, (Government's Exhibit No. 330-B);

Letter written by Menefee to Mrs. Armstrong of date October 2, 1912, (Government's Exhibit No. 331);

Telegram sent by the United States Cashier Company to Ford Dix of date February 5, 1913, (Government's Exhibit No. 333);

Letter written by Menefee to Davidson of date February 10, 1913, (Government's Exhibit No. 334);

Telegram sent by the United States Cashier Company to Mrs. Armstrong of date February 21, 1913, (Government's Exhibit No. 336);

Letter written by Menefee to Ford Dix of date March 1, 1913, (Government's Exhibit No. 337);

Letter written by Menefee to Kellam and King, of date April 11, 1913, (Government's Exhibit No. 339);

Letter written by Menefee to E. E. Amsden of date May 13, 1913, (Government's Exhibit No. 340);

Telegram sent by Ford Dix to Menefee of date June 9, 1913, (Government's Exhibit No. 341);

Telegram sent by Menefee to Mrs. Armstrong of date August 23, 1913, (Government's Exhibit No. 342);

We call the attention of the court to the fact that on the same day (October 5, 1911) that John F. Robb had written to Mr. Overlin, the chief inventor of the United States Cashier Company, and had advised him of the danger of infringement likely to be encountered by any attempted manufacture of this computing machine, he, Robb, wrote another letter marked "Immediate attention Mr. Menefee"; this letter is also made a part of the bill of exceptions by the stipulation and order of date March 23, 1916; it is marked as Defendant's Exhibit No. I-3-c, and we quote the following extract therefrom:

“I have not received as yet further advices supplementing Mr. Overlin’s night letter answered on the 26th of September. You will understand that I was interrupted in the infringement work by instructions in said night letter and would like to know whether the report covering my work completed to date is to be sent or is it to be delayed until some further developments? I think this of grave importance because in the infringement search I have run across certain patents controlled by the National Cash Register Company which will affect our computing machine. Indeed, I believe that the portion of my report directed to the above matter may be the most important development of my work because it is probable that a consultation of your mechanical department and the officers of your company may have to be called to determine upon your future operations in the computing machine line. Unless I run across some other patents bearing on this line the National Cash Register people have protection that may seriously interfere with us.”

It was subsequent to the receipt by Menefee of these notifications that he sent the computing machine out for demonstration purposes and inserted in the newspapers many of the advertisements relative to the great value

of the patent rights of the computing machine.

The situation presented by the record, briefly, is this:

The defendants Menefee and LeMonn had advertised that the United States Cashier Company owned patents to five certain machines; at the time these advertisements were inserted the applications were not on file. They falsely stated that they had no knowledge or notice of any infringement; notwithstanding the fact that they did have notice of infringement they then used their machines for the purpose of assisting in the sale of stock; unable to secure broad and basic protection such as they had advertised they were willing to accept any sort of an instrument from the patent office, just so it would be designated as a patent to a particular kind of machine and thus lead the public to believe that they had broad basic protection and monopoly for all time to come, knowing that the claims in their applications for patent would, upon final allowance, be limited to certain specific mechanism and that all of the broad basic features of their invention had long since been owned and controlled by others. For these reasons this testimony of the patent expert relative to the infringement of which the defendants had knowledge was competent for the purpose of showing an intent to defraud. Again, it is alleged in the indictment:

“Whereas, in truth and in fact and as the de-

defendants Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine and Oscar A. Campbell, and each, every and all thereof at and during and between all the times and dates mentioned, specified and stated in this indictment, then and there well knew, the said shares of stock and each, every and all thereof, were of very little value and of practically no value whatsoever, and said shares of stock and each, every and all thereof were practically worthless"; (Transcript of Record p. 17).

It is also alleged in the indictment:

"Whereas, in truth and in fact and as the defendants Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine and Oscar Campbell, and each, every and all thereof at and during and between all the times and dates mentioned, specified and stated in this indictment then and there well knew, none of the said "INVESTORS", or any other person who should purchase said shares of stock, would ever receive, either from said corporation, namely: United States Cashier Company, or from said defendants Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F.

Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine, or Oscar A. Campbell, any dividend whatsoever;" (Transcript of Record p. 18).

It is also alleged in the indictment:

"Whereas, in truth and in fact and as the defendants Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine and Oscar A. Campbell, and each, every and all thereof at and during and between all the times and dates mentioned, specified and stated in this indictment, then and there well knew, each and every person who should purchase any of said shares of stock from said defendants Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine and Oscar A. Campbell, or from said corporation, namely: United States Cashier Company, would suffer and sustain a loss on account of said transaction of all sums of money which any of said persons should pay over or deliver to said defendants Frank Menefee, F. M. LeMonn, Thomas Bilyeu, O. E. Gernert, B. F. Bonnewell, H. M. Todd, Joseph Hunter, O. L. Hopson, P. E. Muraine and Oscar A. Campbell,

or to said corporation, namely: United States Cashier Company, in exchange or payment for said shares of stock.” (Transcript of Record p. 21).

If the applications for patents which the United States Cashier Company had on file with the patent office infringed certain prior issued patents of other companies to such an extent that the United States Cashier Company could not manufacture or sell its machine, then the stock of the United States Cashier Company was worthless and of no value; this being one of the allegations in the indictment it was proper for the government to prove that the patent applications of the United States Cashier Company were worthless.

The court in permitting the Sewall testimony to be received in evidence limited the effect of this testimony so that it was received only for the purpose of showing an intent to defraud.

The indictment charges:

“That for the purpose of inducing * * * the said investors * * * to purchase said shares of stock * * * and to pay over and to deliver to the said defendants * * * and to the said corporation, money and property in exchange and payment therefor, the said defendants * * * would falsely and fraudulently

and by means of printed advertisements to be by the said defendants inserted in newspapers * * * to be written in letters * * * and by words to be orally spoken by the said defendants * * * represent, pretend and promise, that the said corporation owned the patents to,

- 1—A certain Change Computing Machine,
 - 2—A certain Bank Cashier Machine,
 - 3—A certain Lightning Change Maker,
 - 4—A certain Currency Paying Machine,
 - 5—A certain New Style Adding Machine.”
- (Transcript of Record, p. 12, 13).

The indictment further charges (Transcript of Record, p. 16) that in truth and in fact and as the defendants at and during all of the times stated in the indictment well knew, neither the company nor any of said defendants owned the patents to either the,

- 1—Said certain Change Computing Machine,
- 2—Said certain Lightning Change Maker,
- 3—Said certain Currency Paying Machine,
- 4—Said certain New Style Adding Machine.

It will be observed that in this negative allegation the author of the indictment neglected to include a reference to the Bank Cashier Machine on account of which fact counsel for the defendants at the trial strenuously in-

sisted that it must be conceded that the United States Cashier Company did own a patent to the Bank Cashier Machine. That this position is not tenable, we have shown by authority heretofore quoted and especially by a reference to the case of *Ewing vs. United States*, 136 Fed. 53-56.

The question first arose at the time the Ovaitt testimony was offered and the following proceedings thereupon occurred:

“Thereupon counsel for the defendants said, ‘I am content with this limitation, that these two matters will be instructed to the jury, that the patent is not in controversy.’

“And the court said, ‘In this case I understand it is admitted in the indictment.’ ” (Transcript of Record, p. 176).

It was the contention of counsel for the government at the trial, and it is our contention now, that notwithstanding the fact that the indictment failed to negative the ownership of the Bank Cashier Machine, the indictment did, as shown on page 13 of the transcript of record, specifically charge that the representation as to the ownership of the patents to these five machines was a false pretense, and as shown on page 11 of the transcript of record, the indictment charges that the representations to be made to the public by the defendants were dishonest, fraudulent and false.

It is therefore our contention that these allegations in the indictment would of themselves be sufficient to admit the proof that the United States Cashier Company was not the owner of any patent to the Bank Cashier Machine; but for the purpose of the argument, conceding that such proof was inadmissible for the purpose, and treating the matter as though the Bank Cashier Machine had not been mentioned in the indictment at all, still, after having proven that the defendants had represented that the United States Cashier Company was the owner of the Bank Cashier machine it was then quite proper for the court to permit the government to prove the falsity of this representation and to limit the effect of that testimony so that it would be received for no other purpose than to show an intent to defraud.

Learned counsel for appellants, at page 67 of their brief, gravely propound the question,

“Now, it was not pretended or claimed that Ovaitt’s claim was in fact good, but only that it menaced ‘a great and grave danger.’ Were the defendants obliged to quit selling the company’s stock because they discovered that one of their patents was claimed by somebody else under a transaction that originated before they bought it, upon peril of being convicted of bad faith, and of having their action construed as a scheme and artifice to defraud?”

Counsel does not answer this question and we do—Our answer is, “Yes, if they were honest. Emphatically yes, in view of the knowledge of Bilyeu, the eastern trip of LeMonn, his fraudulent telegram and letter and the fraudulent action of the board of directors thereon; the knowledge of Menefee of the Payograph in June, 1910; the conversation between Menefee and Ovaitt; the conversation between Menefee, Ovaitt and Bilyeu; the failure to sell the English rights on account of the English patent to the Payograph and the letter of Robb to Menefee of date October 17, 1913.”

As a striking example of the extremely technical theory advanced by counsel for the appellants we quote from pages 67 and 68 of his brief:

“The indictment, therefore, does not only not inform defendants of the charge involved in the Ovaitt evidence, but it misleads them, for by charging the representation as to the bank cashier patent and failing to show that it was false, it invites them to be unwary of an attack in that quarter.”

Our answer to this is—Inasmuch as the Cashier Company never did own the patent how could these appellants, who were the company, possibly have been misled. And if misled would they not have had time during an eight weeks trial to have proven they had a patent if they had had one.

The argument of counsel for appellants (Appellant's brief, pp. 84-87, inclusive) and his deductions from the authorities cited therein are not applicable to this case at all, and are all based upon a false premise. Counsel states that after the citation of prior issued patents had been made the claims of the Cashier Company were allowed. He then proceeds to reason that the matter of the citations thus became merged into the final action of the department in granting the patent. The answer to this is that the statement of fact submitted is not borne out by the record.

As shown at page 19 of the transcript of record, the indictment alleges that the United States Cashier Company, at and during all of the times stated in the indictment was insolvent and that the defendants knew it was insolvent. For the purpose of proving this insolvency it was therefore competent to prove that the applications of the United States Cashier Company for its patents were worthless. As shown on page 16 of the transcript of record the indictment further charges that the United States Cashier Company was not engaged in either the business of manufacturing or selling any of said machines, but on the contrary its business was to sell and dispose of its capital stock. Under this allegation the proof of infringement was competent because it tended to show that the company was not contemplating the manufacture or sale of any of its machines.

We therefore confidently submit the following propositions to the court concerning these assignments of error No. IV to XVI, inclusive:

1—The testimony was competent, relevant and admissible;

2—Assuming for the purpose of the argument that the testimony was not competent, still no prejudicial error was committed because the court subsequently withdrew from the consideration of the jury all of the said testimony.

N. Y. etc., R. R. Co. vs. Madison, 123 U. S. 524-526.

Eastern Oregon Land Co. vs. Cole, 92 Fed. 949-952.

Hopt vs. Utah, 120 U. S. 430-438.

Krause vs. United States, 147 Fed. 442-451-452.

Francis vs. United States, 152 Fed. 155-157.

Horn vs. United States, 182 Fed. 721-740.

ASSIGNMENTS OF ERROR XVII, XVIII, XIX.

These assignments are all based upon the action of the court in giving three instructions to the jury. These three instructions are as follows:

Assignment of error numbered XVII is directed against the following instruction:

“It has been truly said in argument that one of the cardinal points in this case is the intent of the defendants. But what intent? Was it their intent that they could make the business of the United States Cashier Company a success? Was it their belief that they could make the enterprise of the United States Cashier Company successful? The answer to these questions would necessarily be No. If they agreed to make false and fraudulent pretenses, representations, or promises; if they agreed to make false and fraudulent representations and assurances, for the purpose of deceiving the investors and the public in respect to the true condition of affairs of the corporation, or the value of its stock, then the ultimate intent to make the business of the corporation a success, or the ultimate belief of the defendants that they could finally make it a success, would by no means furnish any condonation or legal excuse for the false and fraudulent representations, which they would under the circumstances agree to make in order to induce the investors and the public to pay over their money.”

Assignment of error numbered XVIII is directed against the following instruction:

“In considering this question, the question of and concerning the intent to defraud, you must

direct your attention to the intent presented by the particular transaction set out in the indictment. If these defendants agreed that they would put forth the false representations or promises alleged, for the purpose of deceiving and misleading investors and the public into paying over their money, then it matters not how confident they may have been that they would be able to make the business or the corporation a success, or how confident they may have been that they would be able to return that money without loss, or with profit, because the representations which they would have agreed to make would be made for the purpose of getting the money in a wrongful manner, and they could not, under such circumstances, make them rightful by pointing to some ultimate good intent."

Assignment of error numbered XIX is directed against the following instruction:

"The parallel between such a case as I have presented and the crime of embezzlement is very close. It is a well known fact that nearly every man who embezzles money expects that he will be able to pay it back without loss; but his taking is wrongful, and his intent to pay it back without loss cannot cancel the wrong. And so in this case, if the defendants, by means of the false and

fraudulent representations set out in the indictment, agreed to mislead investors and the public generally into paying over to them or to the Cashier Company their money and their property, then their belief that they could ultimately return that money without loss and with profit would not condone the wrong in getting the money by deception.”

We respectfully invite the court to carefully read and consider the entire charge, feeling confident that the court will be impressed with its thoroughness, its clearness and its fairness. In fact, the charge taken as a whole was more favorable to these appellants than they had any right to expect from a court that had been for weeks listening to the proof of fraud as the same is set out in detail in the transcript of record.

It is urged by the appellants that by these three instructions complained of the trial court took from the consideration of the jury its right to pass upon the question of the good faith of the appellants and that the court instructed the jury to find that the appellants were acting with a fraudulent intent. The reading of the instructions will admit of no such conclusion, but in addition to this it is apparent from the many other instructions given by the court that the jury was repeatedly instructed that an intent to defraud was a necessary

element in the case. The court instructed the jury as follows:

“You will observe that there are three essential elements necessary to constitute a crime under this statute. First, there must be the act of two or more persons conspiring and confederating together. One person cannot conspire with himself, and therefore there must be at least two persons acting together in order to constitute a conspiracy. Second, it must appear that the purpose of the conspiracy was to commit an offense against the United States, that is, to violate some law of the United States. And, third, one or more of the conspirators, after the conspiracy has been formed, must do some act to effect the object thereof. Each of these elements is an essential ingredient of the crime charged, and must be established by the government, to your satisfaction beyond a reasonable doubt, before you can find a verdict in its favor.” (Transcript of Record, p. 237.)

and as follows:

“While a conspiracy may be proven by circumstantial evidence, yet the circumstances relied on for the proof must be such as to show that there was a common agreement or understanding, and the mere fact that two or more persons, on

different occasions, did acts of a similar nature looking toward the same end or result, would not constitute, as a matter of law, a conspiracy, unless there was a common design and intention. The evidence must show that the parties accused, and each of them, agreed and confederated together to do the acts charged." (Transcript of Record, p. 238.)

and again, as follows:

"The law in force at the time it is alleged the conspiracy charged in the indictment was formed and existed provides that whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations or promises, shall, for the purpose of executing such scheme or artifice or attempting to do so, place or cause to be placed any letter, postal card, package, writing, circular, pamphlet, or advertisement in any postoffice, to be sent or delivered by the postoffice establishment of the United States, shall be guilty of a crime and punished accordingly.

"It is this statute the defendants are charged with having conspired to violate." (Transcript of Record, p. 240, 241.)

and again, as follows:

“A representation to be fraudulent must not only be false, but must have been made in bad faith and with a fraudulent intent to deceive, to the injury of the person to whom the representations were made. Honest mistakes or errors of judgment in regard to these matters, or any matters involved in this case, or statements inadvertently made, without a fraudulent purpose, even if material, are not fraudulent.” (Transcript of Record, p. 248.)

and again, as follows:

“As I understand the testimony, it is admitted that, at the time the advertisements were inserted in the newspapers, the company did not own patents to all the machines therein enumerated, and whether those representations that they did own patents to machines to which they had no patents, if such representations were in fact made, were fraudulent and made for the purpose of deceiving purchasers of stock is a question for you to determine from the testimony in this case.” (Transcript of Record, p. 248, 249.)

“It is charged in the indictment that one of the means to be used by the alleged conspirators to carry out their fraudulent scheme was to represent that the United States Cashier Company owned patents to the certain coin machine here-

tofore mentioned, when in truth and in fact they did not own such patents. If it was a part of the conspiracy, if a conspiracy existed, that the defendants should represent that the corporation owned patents to the machines which they proposed to manufacture, and such representations were false and known to be so to the parties making them, and were made for the purpose of inducing and persuading persons to purchase stock, it would constitute a scheme to defraud within the statute. And you in this connection should consider any wilful misrepresentation that the defendants may have made in relation to the patent situation. But if at the time these representations were made the company did in fact have patents, issued by the Patent Office of the United States, for any of the machines, the representations, so far as that particular machine was concerned, would not be false. Bad faith or fraudulent misrepresentations cannot be imputed to the defendants in respect of patents in fact issued, and owned by them, or in respect to claims that are in fact allowed, because of some alleged infringement. There is a presumption of law that, where a patent is issued by the United States Patent Office, it does not infringe any known patent and a patentee in accepting such patent is not thereby guilty of bad faith. You are not

called upon to decide in this case whether the patents issued or the claims allowed were in fact an infringement of some invention or patent, or were dominated or affected injuriously by the Osborne and Lindeloff or the Cook patents, or any previous invention, and the evidence of the witness Sewall to that effect should be disregarded. The question on this branch of the case is, were the representations made by the defendants, if any, concerning the patent situation false and made in bad faith, with a fraudulent intent to deceive purchasers of stock in or of the company, or were they made in good faith, with an honest belief in their verity? (Transcript of Record, pp. 247-248.)

And the court also instructed the jury as follows:

“Respecting the charge of the false representations regarding the enterprise of manufacturing and selling the machines mentioned in the indictment and the evidence, if the defendants honestly and in good faith intended to establish a business to manufacture and sell the machines, in the belief, as the situation then appeared to them, that it would be profitable to the company and its stockholders, you cannot find them guilty of the charge that the company was not intending to engage in either the business of manufacturing or

selling such machines.” (Transcript of Record, p. 249, 250.)

The court also instructed the jury as follows:

“To defraud implies or includes all acts, omissions and concealments which involve a breach of legal or equitable duty, trust or confidence generally imposed, and are injurious to another, or by which an undue and unconscionable advantage is taken of another. It means to wrongfully deprive one of something which he already has.” (Transcript of Record, p. 241.)

and also, as follows:

“It is necessary, therefore, that it should appear to your satisfaction from the testimony, and beyond a reasonable doubt, that the conspiracy entered into by the defendants, if there was such a conspiracy, was to devise a scheme or artifice to defraud or to obtain money or property by means of false or fraudulent pretenses or representations to be effected by the postoffice establishment of the United States.” (Transcript of Record, p. 242.)

and also, as follows:

“The defendants have each entered a plea of not guilty. This plea is a denial of every material allegation in the indictment, and imposes upon

the Government the burden of proving each and all of these to your satisfaction, beyond a reasonable doubt, before you will be justified in returning a verdict in its favor."

"Now, the material allegations in brief are, first, that there was a conspiracy, agreement, or understanding upon the part of the defendants; second, that such conspiracy was to devise the particular scheme to defraud set out in the indictment; and, third, that it was a part of the understanding and agreement that the postoffice establishment of the United States was to be used for the purpose of executing the scheme. It is therefore incumbent on the Government to prove, not only that the defendants conspired together to devise the particular scheme set out in the indictment, but that it was a part of such agreement or conspiracy that the scheme should be executed by the use of the postoffice establishment of the United States; and if as to any one or more of the defendants the Government has failed to prove any one or more of the elements necessary to constitute the crime charged, it is your duty to find such defendant or defendants not guilty." (Tr., p. 245, 246.)

and also, as follows:

"With reference to the evidence that the price

of the stock was raised at intervals, if you find that it was done in the honest belief at the time that the progress of the affairs of the company justified such raise, and that the stock was of the value of the increased price, though such belief may not have been justified by the then condition of the enterprise as indicated by subsequent events, you cannot find the defendants guilty because they proved to be mistaken about that.” (Tr., p. 250.)

and also, as follows:

“The indictment also charges that it was the purpose or intent of the defendants to defraud the persons named in the indictment, and the public generally, out of their money. The law presumes that every person intends the natural and probable consequence of his own act, and if you believe from the evidence, and beyond a reasonable doubt, that the defendants, or any two of them, conspired to do the things named in the indictment, substantially in the manner and form as therein set out, and that it was the natural and probable consequence of their acts that purchasers of stock of the Cashier Company would be defrauded, then you would be justified in finding that it was the intent of such defendants so entering into the conspiracy, if there was a con-

spiracy, to defraud the persons named." (Tr., p. 252.)

and also, as follows:

"While circumstantial evidence is admissible and competent to establish a fraudulent intent, it is equally admissible and competent for the purpose of establishing good faith and honesty of purpose, or the non-existence of a fraudulent intent; and it is for you to say in this case, from all the facts and circumstances, whether the defendants entered into a conspiracy to devise a scheme and artifice for the purpose of defrauding those with whom they might deal, as charged in the indictment, or whether they acted in good faith. They are not on trial for evolving or devising an improvident or impracticable scheme, even though you should find their plan to be such. Nor are they on trial for mere errors of judgment. They are on trial for a criminal offense, and an essential element of that offense is an evil or criminal intent, which it is incumbent upon the Government to prove to your satisfaction, beyond a reasonable doubt. And where, as in this case, circumstantial evidence is relied on, the circumstances themselves must be proven, to the satisfaction of the jury and beyond all reasonable doubt, and when so proven, they must not only be

consistent with the main fact in issue, namely, the guilt of the defendants, but they must be inconsistent with every other rational hypothesis. The question for your determination is whether the defendants were acting in good faith in the sale and disposition of the stock of the corporation with which they were connected, or whether they were using such corporation and its business as a basis for a fraudulent scheme.” (Transcript of Record, p. 258, 259.)

and also, as follows:

“Now, gentlemen, this is a criminal case. The defendants have each entered a plea of not guilty, and, as I have said to you, that imposes upon the Government the duty of proving every material allegation necessary to constitute the crime, to your satisfaction beyond a reasonable doubt, before you can convict.

“When I have said heretofore in these instructions that a certain fact must be established by the Government, or a certain fact must be proven before you are justified in finding a verdict of guilty, I have meant always that it must be proven to your satisfaction beyond a reasonable doubt.

“The defendants, and each of them, are presumed to be innocent of this charge. This pre-

sumption is not a mere fiction which can be disregarded at pleasure. It is a substantial part of the criminal law of the country, and continues and abides with the defendants throughout the trial until overcome by the testimony. They are not required by law to prove their innocence. The burden is upon the Government to prove their guilt, and that beyond a reasonable doubt." (Transcript of Record, p. 264, 265.)

"You are the exclusive judges, gentlemen, of the credibility of the witnesses and the weight to be given to their testimony. You are also the exclusive judges of all questions of fact, and if at any time during the trial the court has intimated its views concerning any disputed question of fact, or the testimony of any witness, you are to disregard it unless it conforms to your own understanding." (Transcript of Record, p. 265, 266.)

The court had instructed the jury that in regard to the alleged false representation regarding the enterprise of manufacturing the machines mentioned in the indictment, that if the defendants honestly and in good faith intended to establish a business to manufacture and sell the machines in the belief as the situation then appeared to them, that it would be profitable to the company and its stockholders then the defendants could not be found

guilty of the charge that the company was not intending to engage in either the business of manufacturing or selling such machines. (Transcript of Record, p. 249.) A similar instruction relative to the evidence concerning the price of stock and the fact that it was raised at intervals was also given to the jury by the court:

“The statute which it is charged the defendants conspired to violate includes everything designed to defraud by false and fraudulent representations as to the past or present, or suggestions and promises as to the future, and the significant fact in this case is the intent and purpose of the defendants in making the representations charged in the indictment, if they were in fact made. The question for your determination is not whether the business which the defendants were engaged in promoting was a legitimate business, or was practicable or not. If the corporation, and the defendants as officers and agents thereof, entered in good faith upon the business, believing that the representations made by them, or to be made, were true, and that they could and would earn enough to justify the promised returns on the investment, they should not be convicted, no matter how visionary you may consider their plans. Their good or bad faith in these matters is to be determined, and their several acts and dec-

larations construed and interpreted, by conditions as they existed at the time the statements and declaration were made, and as they appeared to the defendants at that time, and not by the final result of the enterprise, or from present conditions." (Transcript of Record, p. 250, 251.)

Again, as shown on page 256 of the transcript of record, the court instructed the jury as follows:

"In determining whether or not the defendants intended to defraud the investors of the money by selling to them the shares of stock of the corporation, you have a right to take into consideration the question of how commissions which the evidence shows, or tends to show, were received by the defendants, or any of them, from the proceeds of the sale of the stock." (Transcript of record, p. 256.)

and the court also instructed the jury as follows:

"Now, the intent to form a scheme or artifice to defraud is an act of the mind which necessarily involves an intention to defraud. The purpose to devise such a scheme and the evidence of such intent may be shown by the acts and declarations of the parties and by attending circumstances, as well as by direct evidence. Whether such an intent has been proved in this case is a question of

fact for your determination. Experience shows that positive proof of fraudulent acts is not generally to be expected, and for that reason, among others, the law permits a resort to circumstances as a means of ascertaining the truth, and in such case great latitude is allowed by the law to the acceptance of indirect or circumstantial evidence, the aid of which is constantly required, not merely for the purpose of remedying the want of direct evidence, but also to supply protection against imposition. Whenever the necessity arises for a resort to circumstantial evidence, either from the nature of the inquiry or the failure of direct proof, great latitude is allowed in its admission, for the reason that the force and effect of circumstantial facts usually, and almost necessarily, depend upon their connection with each other. Circumstances altogether inconclusive if separately considered may, by their number and joint operation, established or corroborated by minor circumstances, be sufficient to constitute conclusive proof. And where fraud in the purchase or sale of property is in issue, evidence of frauds of like character, committed by the same parties at or near the same time, is admissible, on the ground that, where transactions of a similar character executed by the same parties are closely connected in point of time, the inference is reasonable

that they proceed from the same motive." (Transcript of Record, p. 256, 257.)

and the court also instructed the jury as follows:

"The defendants, therefore, are not to be found guilty merely for selling or offering for sale stock in the corporation, although it may have proven an unprofitable investment to the purchaser, nor for mere mistakes or errors in judgment. And there is no presumption of fraud from the fact that glittering and glowing promises may have been made and not carried out, unless it shall appear that the persons who made such promises knew at the time of making same that they could and would not be carried out." (Transcript of Record, p. 259.)

IN REVIEWING INSTRUCTIONS THE WHOLE THEREOF SHOULD BE CONSIDERED.

We submit as a proposition of law, almost elementary, that in reviewing the instructions of a trial court for the purpose of ascertaining whether or not error has been committed, all of the instructions must be read and the charge must be considered as a whole. This legal proposition is so well settled in federal courts that it hardly needs citation for support. However, the following cases are directly in point:

No. Pac. R. R. v. Babcock, 154 U. S. 190-201,
in which the court said:

“Separated from the context this general language might have misled, but when considered in proper connection with the rest of the instruction given, it could not have done so.”

Agnew v. U. S., 165 U. S. 36-49-50.

This case has been reviewed in connection with another point. It is one where the defendant was convicted of making false entries with intent to defraud while an officer of a national bank. In a portion of the instructions given by the lower court, which were assigned as error, it was stated that intent may be presumed from the doing of a wrongful or fraudulent act, which, if proved, throws the burden on the defendant to prove to the jury beyond a reasonable doubt his innocent intent. The Supreme Court in passing upon this assignment, said:

“Conceding that the statement of the court that the evidence, to overcome the presumption, must be sufficiently strong to satisfy the jury beyond a reasonable doubt was open to objection for want of accuracy we are unable to perceive that this could have tended to prejudice the defendant, when the charge is considered as a whole.”

In the case of **Stout vs. United States**, 227 Fed. 799-802, the defendant had been convicted of misapplying funds of a national bank of which he was president. Error was assigned because of the refusal of the trial court to give certain instructions and to certain parts of the charges given. The court, in considering these assignments said:

“One request sought an instruction that the accused was not on trial for various defaults or misconducts which were enumerated. But the charge of the court contained a definite statement of the offense set forth in the fifth count, and that he could not be convicted of something else. It was unnecessary to negative the other matters in detail. The parts of the charge given which are criticised are not objectionable, when viewed as they should be in their proper context.”

When all of the instructions given by the court are read together it is clear and plain that the court left every question of fact to the jury and that the jury was carefully instructed to the effect that before the defendants or any of them could be found guilty it would be necessary for the government to show to the satisfaction of the jury and beyond a reasonable doubt that the defendants deliberately set out to defraud the investors. The portion of the instructions against

which most of the objection of counsel for the appellants is directed is that part of the assignment of error No. XVII, which reads as follows:

“It has been truly said in argument that one of the cardinal points in this case is the intent of the defendants. But what intent? Was it their intent that they could make the business of the United States Cashier Company a success? Was it their belief that they could make the enterprise of the United States Cashier Company successful? The answer to these questions would necessarily be No.” (Transcript of Record, p. 308.)

We submit that in order to properly interpret this instruction the entire instruction must be read and that this instruction must also be read in conjunction with all of the other instructions in the case. When this is done it appears that the court was commenting upon the argument of counsel to the effect that the cardinal point in the case was the intent actuating the defendant. The instruction might possibly have been more clear if the first portion thereof had been as follows:

“It has been truly said in argument that one of the cardinal points in this case is the intent of the defendants. But what intent? Does this mean their intent that they could make the business of the United States Cashier Company a

success? Does this mean their belief that they could make the enterprise of the United States Cashier Company successful? The answer to these questions would necessarily be No."

And when the entire instruction is read, it appears that this was the meaning of the court, and that the jury could not possibly have been misled by the instruction. If the court had intended to instruct the jury as a matter of law that the evidence showed a conclusive intent to defraud upon the part of the defendants then it would not have been necessary for the court to have given to the jury that portion of the said instruction which is made the basis of assignment of error No. XVII, which reads as follows:

"If they agreed to make false and fraudulent pretenses, representations or promises; if they agreed to make false and fraudulent representations and assurances, for the purpose of deceiving the investors and the public in respect to the true condition of affairs of the corporation, or the value of its stock, then the ultimate intent to make the business of the corporation a success, or the ultimate belief of the defendants that they could finally make it a success, would by no means furnish any condonation or legal excuse for the false and fraudulent representations, which they would under the circumstances

agree to make in order to induce the investors and the public to pay over their money." (Transcript of Record, p. 308.)

Counsel for appellant at page 104 of their brief insist that the jury could not have understood the instruction which is made the basis of assignment of error XVII. Counsel puts upon it an entirely unwarranted construction. The correct rule is to consider the instructions as a whole.

Pointer vs. United States, 151 U. S. 396-416.

The claim made by appellants is without merit when all of the instruction is read and analyzed.

Stout vs. United States, 227 Fed. 799, 802.

No. Pac. R. R. Co. vs. Babcock, 154 U. S. 190-201.

THERE WAS NO ERROR IN THE COURT'S INSTRUCTIONS ON "INTENT TO DEFRAUD."

It remains to be considered whether the instructions correctly state the law governing an intent to defraud growing out of wilful, false representations made for the purpose of inducing prospective purchasers to part with money.

By the instruction which is made the basis for as-

signment of error XVII, the jury was instructed that if the appellants agreed to make false and fraudulent pretenses, representations or promises; if they agreed to make false and fraudulent representations and assurances for the purpose of deceiving the investors and the public in respect to the true condition of affairs of the corporations, or the value of its stock, then the ultimate intent to make the business of the corporation a success, or the ultimate belief that they could finally make it a success, would furnish no condonation or legal excuse for the said false and fraudulent representations.

Taking the instructions as a whole, as they define the proof necessary to establish an intent to defraud, they were more favorable than these appellants had any right to expect. In the face of the record, the court would almost have been justified in telling the jury as a matter of law that the scheme which the evidence proved had been carried out by the appellants was a scheme to defraud.

By the instruction which is made the basis for assignment of error XVIII, the court instructed the jury that in considering the question of the intent to defraud, the jury should direct its attention to the intent presented by the particular transaction set out in the indictment. The rest of the instruction is substantially the same as the instruction which is made the basis

for assignment of error XVII, and these we will consider together.

We believe it to be the law that if the pretenses and promises alleged in the indictment were false and known to be false by the appellants at the time they were made, and are made for the purpose of deceiving and misleading the public, then it would make no difference whether the investors were actually defrauded or not, assuming that by such false representations and promises they had been induced to do that which they would otherwise not have done, and to part with their money and property at times when they would not have done so if the true conditions had been known to them. There is also the legal presumption existing in both civil and criminal cases that the intent with which an act is done is inferred from the result of the act itself and that the law presumes that every sane man intends the legitimate consequences of his own act. Applying these principles of law to this case, if the defendants made representations known by them to be false and untrue for the purpose of deceiving the public into making purchases of the stock of the company, then they would be presumed to have intended to defraud them unless that presumption could be overcome by a showing of good faith. The only way that they could show their good faith would be to prove either that the representations were true or that if they were untrue this fact was not known to them at the time the representations

were made. Upon these legal propositions there is an abundance of adjudicated authority.

The case of *Harris vs. Rosenberger*, 145 Fed. 449-455, is a case in which an injunction was granted by the lower court against the enforcement of certain postal fraud orders issued against Rosenberger's concern prohibiting it from selling through the agency of the mail, whiskey of a different quality and character from that advertised; in this case the government admitted that the whiskey was sold at a fair market valuation and was worth the full price charged. The lower court granted the injunction but on appeal the Circuit Court of Appeals for the eighth circuit reversed the decision of the lower court. Rosenberger contended that the postal fraud statute, rightly interpreted, did not embrace all schemes and artifices for obtaining money through the mail by means of false representations, but only those in which it was contemplated that absolutely nothing whatever equivalent in value to the money given should be given in return therefor. In commenting upon this construction of the statute the court said:

"The third proposition proceeds upon the theory that sections 3929 and 4041 are to be read in connection with cognate criminal statutes (Sections 3894 and 5480, as respectively amended September 19, 1890, c. 908, 26 Stat. 465, and March 2, 1889, c. 383, 25 Stat. 873) (U.S. Comp.

St. 1901, pp. 2659, 3697) and in the light of the maxim 'noscitur a sociis' and that, when they are so read, the provisions therein against 'conducting any other scheme or device for obtaining money or property of any kind through the mails by means of false and fraudulent pretenses, representations or promises,' although broad and comprehensive, are restricted to schemes which are wanting in all the elements of a legitimate business, or in which it is intended to return nothing whatever or nothing at all equivalent in value for the money or property obtained. And, applying this theory to the facts disclosed before the Postmaster-General, it is contended that, as selling whiskey is a legitimate business, and as the appellee was giving an equivalent in value for the money obtained, the case was not within the statutes, although the settled plan upon which the business was being conducted was that of obtaining orders and remittances by means of intentional and gross misrepresentations calculated to induce purchasers to believe that they were buying something different from that which was actually being sold and worth more than what they were parting with.

"While not doubting that the statutes named are to be read together, we do not accede to the

interpretation sought to be placed upon them. They have been frequently considered by the courts, and because of the comprehensive language in which they are expressed the efforts to narrow them by construction have not been successful."

The court then reviews a number of authorities in support of its conclusion, and at page 458, says further:

"Our conclusion is that when a business, even if otherwise legitimate, is systematically and designedly conducted upon the plan of inducing its patrons, by means of false representations, to part with their money in the belief that they are purchasing something different from, superior to, and worth more than, what is actually being sold, it becomes an objectionable scheme or device within the intendment of sections 3929 and 4041, although what is being sold may approximate in commercial value the price asked and received. The difference between such a scheme or device and those where nothing whatever or nothing at all equivalent in value is intended to be returned for the money obtained is one of degree only, but not of principle. Both are grounded in deceit, operate injuriously upon the public, and constitute the obtaining of money by means of false pretenses. A purchaser is entitled to re-

ceive what he is induced by the vendor's representations to believe he is ordering and paying for, and not something which he does not order and may not want at any price."

Durland vs. United States, 161 U. S., 306, 313.

In this leading case under the postal fraud statute the court says:

"In the light of this the statute must be read, and so read it includes everything designed to defraud by representations as to the past or present, or suggestions and promises as to the future. The significant fact is the intent and purpose. The question presented by this indictment to the jury was not, as counsel insist, whether the business scheme suggested in this bond was practicable or not. If the testimony had shown that this Provident company, and the defendant, as its president, had entered in good faith upon that business, believing that out of the moneys received they could by investment or otherwise, make enough to justify the promised returns, no conviction could be sustained, no matter how visionary might seem the scheme. The charge is that in putting forth this scheme it was not the intent of the defendant to make an honest effort for its success, but that he resorted to this form and pretense of a bond without a thought

that he or the company would ever make good its promises. It was with the purpose of protecting the public against all such intentional efforts to despoil, and to prevent the postoffice from being used to carry them into effect, that this statute was passed; and it would strip it of value to confine it to such cases as disclose an actual misrepresentation as to some existing fact, and exclude those in which is only the allurements of a specious and glittering promise."

At page 312 of the *Durland* case, the court, in commenting upon the scheme of defendant, says:

"In other words, he was trying to entrap the unwary, and to secure money from them on the faith of a scheme glittering and attractive in form, yet unreal and deceptive in fact, and known to him to be such."

In the brief of the appellants, counsel contends for this case that it narrows the fraudulent schemes condemned by the statute to those where the defendants have no belief in the success of their business, or at least to those cases wherein those who have invested in the business could never possibly get any returns from it. We submit that this leading case is not fairly susceptible to any such construction.

O'Hara vs. United States, 129 Fed. 551-555.

This was a case under the mail fraud statute. The court, in speaking of the scheme charged, said:

“The intention to make false and fraudulent representations by means of circulars and letters transmitted through the mails, and thus obtain money from the credulous, constituted the scheme itself.

“The objection that on its face the scheme was impossible of execution, and therefore should have deceived no one, is without merit. * * * Schemes to defraud depend for success not on what men can do, but upon what they may be made to believe, and the credulity of mankind remains yet unmeasured.”

One of the best considered cases which has been brought to our attention is the case of **Wilson vs. United States**, 190 Fed. 427. This case bears such a striking resemblance to the case at bar that we invite the attention of the court to a careful analysis and comparison of them. In the celebrated case against Wilson, he and his associates were indicted, tried and convicted for conducting what is commonly known and called the “wireless swindle.” Practically every element of the scheme and artifice to defraud mentioned in the Wilson case is present in the case at bar, and in addition to this in the case at bar we have a great many additional allegations and proofs

of fraudulent intent. At page 433 of the opinion, the Court said:

“But whatever may be the rule in civil cases, we are satisfied that damage is not made an essential element of the federal statutory offense of using the mails to execute a scheme or artifice to defraud. We are of the opinion that a scheme or artifice is established by proof of false and fraudulent misrepresentations by which a person’s right of open and fair dealing is invaded; that having shown that the defendants used false and fraudulent means to induce persons to part with their property and to purchase stock which was not of the value represented, the government was not required to go further and prove either the existence or extent of damage to the purchasers.

Any other construction of the statute would deprive it of all force in dealing with fraudulent schemes in the guise of legitimate corporate enterprises and would place a premium on lies and deceit. It would only be necessary to deal in a stock of uncertain value, e. g., of a corporation owning patent rights, and all the false and fraudulent statements imaginable could be made with impunity and the mails be used to prey upon the public. Purchasers would not obtain that which they were promised; their money would be ob-

tained by false and fraudulent representations, but in how many cases would the government show that they failed to get their money's worth? How could the real value of such shares be established?"

At page 439 of the opinion, the Court, in considering the question as to whether or not the evidence was sufficient to sustain the conviction of two of the defendants, reviews that portion of the evidence which shows that the said defendants, being salesmen, had a contract with the company by which they were to receive a fifty per cent commission for the sale of the wireless stock. Commenting upon this phase of the case the Court said:

"A court may almost take judicial notice of the fact that the stock of a corporation selling for twice its par value, does not require the payment of such a commission to dispose of it. If it does, the selling price must be altogether artificial. The inference must be either that the company is fraudulent if the commission is not excessive, or that the commission is fraudulent if the company is what it purports to be."

In the case at bar the commission upon the sale of the stock was fifty per cent and was divided between the conspirators as follows:

The agent making the sale received thirty per cent;

the sales manager, LeMonn, received ten per cent; and the president, Menefee, received ten per cent. The stock was not only selling at twice its par value as in the Wilson case, but at three times its par value, and the indictment alleged, and the proof shows, that it was a part of the conspiracy to sell the stock at \$50.00 per share which would have been five times its par value. The conclusion to be drawn from a comparison of these two cases seems to us to be irresistible.

In affirming the Wilson case, the court concluded its able and exhaustive opinion upon the law in the following terse language:

“For these reasons, we reach the conclusion that no error was committed in the trial of the three defendants. Moreover, after an examination of the evidence, we think that their conviction was right: While their original purpose may have been legitimate, while they may have believed in the future of wireless telegraphy, we are satisfied that they deliberately entered into a scheme to take advantage of the public interest in a great and meritorious invention to sell to the public thousands of shares of stock which they knew to be practically worthless. They could accomplish their objects only through the use of the mails, and through the use of the mails has come their condemnation under a federal statute. But

the judgment will not serve the purpose it ought to serve if it be regarded merely as inflicting punishment on these defendants. It should reach far beyond them and serve as a warning to that vast crowd of speculators, promoters, gamblers and adventurers who pose as men of business and affairs and carry on their operations in the borderland between legitimate undertakings and criminal schemes. It ought to bring home to their understanding that the misappropriation of other peoples' moneys is not distinguished from larceny by designating the process a great corporate enterprise; that inducing hundreds of men and women to part with hundreds of thousands of dollars for worthless securities calls for condemnation just as much as cheating in the sale of a single musical instrument or photograph album; that after all there is no merit in wholesale knavery over cheap tricks or in gilded devices over barefaced swindles, and, furthermore, that neither swindlers of high degree nor cheats of low station can employ with impunity the mails of the United States in aid of their fraudulent schemes." (p. 439).

In the case of *McGregor vs. United States*, 134 Fed. 187-195, the defendant was charged with having conspired with others to defraud the United States while he was in the employ of the postoffice. The conspirators

were charged with having fraudulently awarded a certain contract for mail pouches to one Smith, and they contended on appeal that the government was not defrauded because it had suffered no loss. Considering this question the court said, at page 196:

“We find from the record that said counsel was contending in his argument that the evidence before the jury did not show that the defendants had intended to defraud the United States, as they might have thought that the government would suffer no loss by awarding the contract to Smith, because, if he had not furnished the pouches Runkel would have furnished them at the same price; and that, if the defendants did not think they were defrauding the United States, they did not then have the corrupt motive, without which there could have been no intent to defraud; and that, while men like the judge on the bench, or counsel in the case, might know they were, under the circumstances set forth by the witnesses, defrauding the government, still men of the character, and position of the defendants might not have so thought.”

The court, in disposing of this argument, said:

“It is well settled that the law presumes that every man intends the legitimate consequence of his own acts, and that such acts, when knowingly

done, cannot be excused on the ground of innocent intent. In both civil and criminal cases the intent with which an act is done is inferred from the result of the act itself, and the law presumes that every man intends the legitimate consequence of his own acts.”

The doctrine laid down in the McGregor case was followed in the case of *Agnew vs. United States*, 165 U. S. 36.

The case of *Walker vs. United States*, 152 Fed. 111 (opinion by Judge Wolverton), was a mail fraud case. We quote from page 115 of the opinion:

“It is further insisted that there was no intent to defraud shown, looking throughout the whole testimony given in the case, which has been brought up in the record. It is entirely clear, however, that the intent is patent when the scheme itself is understood, and that it was unnecessary that it be further shown by the admissions, or the express assertions, of the defendant himself as to what his purpose was in devising the artifice or scheme, and in working in pursuance thereof.”

The language of the court just quoted in the Walker case might well be applied to the case at bar. A scheme whereby the defendants would falsely represent that

they owned a large number of valuable patents, were engaged in the business of manufacturing and selling machines, and were putting them on the market; were falsely representing that privately owned stock was treasury stock, the proceeds of which were to go into the company, whereas in truth and in fact they were to go into the pockets of the defendants; the publication of false and untrue statements of assets and liabilities, the statement that the company was in a splendid financial condition when in truth and in fact it was insolvent and known to be such; presents a scheme to defraud in which the intent is much more self evident than in the scheme considered by the Court in the Walker case.

McCarthy vs. United States, 187 Fed. 117, was a mail fraud case in which the appellants alleged error on the ground that the court should have instructed a verdict for the defendants because there was no evidence establishing that any fraudulent scheme had been devised or operated. The court, in describing the scheme, said:

“It is not necessary to reproduce the circulars, maps, and bird’e-eye views which were exhibited to persons who responded to the first request. Without containing an absolute misstatement as to any single fact, the whole description was carefully devised to lead prospective purchasers, resident some of them in distant states, to suppose

that the 'Park' was practically an extension of the well-known 'Westhampton Beach,' with its churches, schools, electric light, etc., and that it was a 'suburban district of Greater New York.' "

The appellate court approved the following instruction as being in accord with *Durland vs. United States*:

"The question you have to consider is whether these defendants planned and intended, or tried to plan, a method by which they could use the mails in getting people to communicate with them, or come into communication with them, and they could get in touch with people, so these people would be deceived or misled into paying or sending money for some article of value to these defendants under ideas not justified by the facts as they actually existed."

At page 109 of the brief of the appellants, counsel concludes that the court has instructed the jury that they might convict for making a false promise and a false assurance, believing it to be true. Of course, in the instruction, the court had told the jury that the representation would also have to be fraudulent, which word would of itself imply an intent to defraud. The charge of the court when considered as a whole, or in fact, when any part or portion of it is considered, cannot be fairly construed so as to bear out the present contention of the appellants, and it could not have been so construed

by any person of even less than average intelligence, for the court, in its instructions, as hereinbefore shown by reference cited, said to the jury over and over again, that the false representations must have been knowingly made and knowingly false or no verdict of guilty could be returned against them.

Colburn vs. United States, 223 Fed. 590-596, is a case wherein the theory was advanced that a certain amount of "puffing" was permissible, but the court held that if this so-called "puffing" was done fraudulently that it would constitute a violation of section 215. We quote from page 596 of the opinion:

"In view of the fact that the charge in the indictments was that the defendants made the representations concerning the land fraudulently and with the intent and purpose of deceiving persons to whom they might come, an instruction telling the jury that the law indulges sellers in 'puffing their property' to bring about sales at the highest attainable price, and otherwise as stated in the requested instruction, would have been contradictory to the general scheme of the indictments and fatally misleading, without some modification to the effect that the justifiable 'puffing' must have been within the limits of honesty and fair dealing. Without such modification the instruction would have justified the jury

in finding the defendants not guilty, however fraudulent their representations might have been. The request was properly denied.”

The supreme court denied a petition for a writ of certiorari in the Colburn case, 239 U. S. 643.

Kaplan vs. United States, 229 Fed. 389, 390.

This was a mail fraud case where the defendant was convicted of sending a false financial statement through the mails. In passing upon the question whether this would constitute a scheme to defraud under the statute, the court said:

“The crucial question, however, is whether or not the defendant devised a scheme to defraud by using false statements of his financial condition to induce the sale to him on credit of a large quantity of goods which, had the truth been known, would not have been sold. Here, the controlling consideration is the truth or falsity of the statements. If false and known by the defendant to be false, it is impossible to reconcile his conduct with honesty. * * * The jury has found the issue of fact against the defendant and we see no reason for disturbing their verdict.”

This case is clearly parallel with ours as far as the instructions are concerned, or as far as the interpretation placed upon them by the defendant is concerned.

Here the court says the test is whether or not the statements were false and the defendants knew them to be so.

Bettman vs. United States, 224 Fed., 819, is a case wherein the defendant was convicted of a mail fraud similar to the Kaplan case above cited. The Bettman case goes very fully into the law on the subject wherein an intent to defraud is presumed from false and fraudulent representations knowingly made for the purpose of deceiving the public.

In this case the defendant's contention on appeal was that the mail fraud statute did not apply to the act of one engaged generally in a legitimate business otherwise legitimately conducted, but who for the purpose of obtaining money, property or financial credit, makes a knowingly false statement of his financial condition, either in a single instance or in a series of similar instances, not joined together, but independent of each other, but is confined to broader and more comprehensive frauds, such as the case of a business *systematically* and designedly so conducted generally that through false representations persons are induced to part with their money or property in the belief that they are getting something different from, or better and worth more than, what is actually being furnished. It was further urged that a clear distinction exists between "an intent to defraud" and the formation of a "scheme or

artifice to defraud.” But the appellate court held that such contention was without merit, and said at page 824:

“‘A scheme may include a plan or device for the legitimate accomplishment of an object. But to come within the terms of the statute under consideration the artifice or scheme must be designed to defraud,’ and the term ‘defraud’ was held to mean only ‘the wrongful purpose of injuring another.’ A fraudulent scheme may be within the statute, even though used in the prosecution of an established business, legitimate if honestly conducted.”

It was also urged in this case that

“The indictment does not charge and that the evidence does not show that there was a scheme or artifice to defraud. The argument is that the indictment does not charge that the corporation was insolvent, and that there was no evidence that it was a part of the scheme to give notes not worth par; that the scheme, in order to be criminal, must have contemplated the giving of notes not worth the money paid therefor, so that those taking the paper would receive at the most, something unsubstantial, although it is not claimed that it is necessary to prove that the notes were actually worth less than their face.”

We might say here in further explanation that the scheme charged in the indictment was that the defendant was to furnish a false financial statement to a certain broker or banker, who had in the past been buying the commercial paper of the corporation of which the defendant was president and then negotiating it, and this financial statement was made for the purpose of having the broker discount a certain amount of commercial paper. The mails were used in effecting this scheme. The appellate court, however, in disposing of this last above mentioned contention, said at page 827:

“We are not impressed with this contention. * * * It is not necessary to criminality under the act that nothing whatever is to be given in return for the money received * * * nor is mere solvency of the borrower or the *collectibility in fact* of the notes necessarily conclusive against an intent to defraud. * * * In our opinion the purchasers of the paper in question were defrauded within the meaning of the law; That is to say, they were *injured* when the possession of their money was obtained by materially false representations of the financial worth of the borrower, and such purchasers thereby subjected to substantial risk of failure to recover back their money. * * * Their money in such case was obtained by false and fraudulent representations.”

There was another point of interest decided in this case. The financial statement proven to be false was typewritten and signed by the defendant. However, there was no proof of who did the typewriting or who wrote any of the figures on the statement, the bookkeeper of the company being unable to identify this. There was also testimony that the defendant was not a bookkeeper and did not understand bookkeeping. However, the court held that in view of the defendant's intimate connection with the business, and the asserted impracticability that one so familiar with it and in the habit of borrowing money for the business would overlook certain large items which were left out of the statement, there was room for an inference of fact that the defendant knew of the falsity of the financial statement, and the evidence was sufficient to go to the jury on the question of such knowledge. (Page 828.)

Ewing vs. United States, 136 Fed. 53, (9th Cir.) 57.

This is the same case above cited, wherein the court decided it was not necessary to negative allegations of false representations. The question as to what constituted an intent to defraud was also presented here. We quote from page 57 of the opinion:

“It was further urged that the indictment is fatally defective for want of averment that the plaintiff in error intended to defraud any one.

The indictment charges that the false representations were made 'solely for the purpose of obtaining money, goods, and property of the said persons whom they might induce to enter into correspondence with them,' and further alleges that, 'by reason thereof, certain persons named were induced to, and did, give to the plaintiff in error and his associate certain money.' But it is urged that there is no allegation of an intent on the part of the plaintiff in error to convert the money so obtained to his own use. Such an allegation was unnecessary. The indictment charged a scheme to defraud by means of false representations to be disseminated through the mails, that the scheme was carried out, that the representations were false and fraudulent, and that thereby certain named persons were induced to part with their money and give it to the plaintiff in error. The indictment thus charged all the essential elements of an offense under the statute."

Horn vs. United States, 182 Fed. 721-737, is applicable and interesting, and we quote from page 737 of the opinion:

"A representation made by means of letters or circulars sent through the mails may be so obviously without foundation in fact as to afford ample evidence of a criminal intent. Neverthe-

less, if the representation is made upon an honest conviction of its truth, or upon facts affording reasonable grounds to believe that it is true, it does not aid in effecting a scheme to defraud. Whether or not such representations are false, or, if false, were made with an honest belief that they were true, is a question of fact, even though the representations may be such as to evince to an intelligent mind their untruth. Each of the defendants testified that he believed the representations made by him to be true; but this is not conclusive, and there was an abundance of other testimony that the value of the mining property, and other facts within the actual knowledge of each defendant, were such that he could not honestly have had any well-grounded belief that the representations made by him as to the present or prospective value of the property were true. The question, therefore, was one for the jury."

At page 108 of the brief of the appellants, criticism is made of that portion of the instruction where the court uses the crime of embezzlement as an illustration. This illustration was used by the court in the instruction which forms the basis of assignment of error XIX. We submit that the illustration was an apt one and one which was entirely proper and should have been

made. In this connection, we desire to call attention to the case of *Pointer vs. United States*, 151 U. S. 396-416, which holds that such illustrations are permissible.

THE INSTRUCTIONS GIVEN ON "INTENT TO DEFAUD" WERE WARRANTED BY THE EVIDENCE.

We now pass to a consideration of the question as to whether or not the evidence in this case warranted these three instructions complained of relative to an intent to defraud. Much that we have already said upon the admissibility of certain testimony has a bearing upon this question; within the limit in which this brief should be kept in order not to unduly try the patience of the court it will be impossible to review all the testimony which would authorize the court to give these three instructions of law to the jury.

We will at this time, however, refer to some additional proof of fraud which appears in the record.

In this connection, assuming that the court will read that portion of the bill of exceptions set out in the transcript of record between pages 111 and 189 which deals with the proof of fraudulent conduct upon the part of these appellants, we will refer only at this time to certain of the exhibits introduced in evidence and made a part of this bill of exceptions by stipulation of coun-

sel and the order of the court. At page 136 of the transcript of record there appears the following statement with reference to these exhibits:

“These exhibits and each, every and all thereof were received in evidence and read to the jury, the government having offered testimony which tended to prove the issuance of each document and the authorship of each letter and telegram, together with proof that each of the letters was transmitted through the mails at the direction of the writer.”

Government's Exhibit No. 190 is a letter written by the defendant Hopson to the defendant Menefee, of date June 13, 1912. This letter is as follows:

“Hope to pull Dr. Milliken across the plate tomorrow for \$5,000.00 worth of our stock at \$20.53 per share. It will make the total sale \$5,185.50. The reason for the odd amount is this: I am selling him a block at twenty dollars and he is to pay interest on it since it was first sold, which in this case was Feb. 12th. He must take the entire block, of \$5,000.00 worth, in order to get the syndicate agreement and a place on the board of advisors. Now, he can buy 400 shares at fifteen and intended doing so until I sprung this syndicate agreement and telegram from you to the effect; that you had looked him

up and that I might offer him place on the advisory board. Of course you never saw that wire, but having received telegram blanks, it wasn't hard to get it. The Dr. is another Campbell in that he likes the honor and incidentally the long end of the deal. He is president of the Mt. Shasta Banking Company here and an A1 man for us. He is worried about whether or not he will have jurisdiction over enough of the surrounding territory. I have assured him on that score. Now he is not in shape to take the entire block himself right at the present moment as his money is out on loans and he is getting four of his friends to go in with him. I told him tho, that the stock will all be issued to him personally and that any arrangement he might have with his friends would have to be between he and them. He to do that, because I told him that in order to get the stock at the special price and under the syndicate agreement, the company insisted that he must take at least \$5,000.00 worth. The Dr. is confident that with his help we can sell several thousand dollars worth of stock in this valley, but to do it he wants the company to send a completed machine here. Please let me know at once after I wire that the deal is closed just when we can get the completed machine. The Dr. has a car and believe me has been some

busy the past several days getting this thing through. Your letter to him, and the by-laws and articles of incorporation passed muster in A1 shape. Of course like all such men he found plenty of things that he thinks could be made better. One thing in particular and a point that I conceded was, that the syndicate agreement read as follows on 4th line of paragraph 3: 'States set aside five (5%) per cent of the selling and leasing price.' As it now reads the word leasing is not there. That should make no great difference to the Company, but it makes a lot of difference to him.

"Now two of his friends will be in town tomorrow and the deal will be closed at that time, so he assured me a few minutes ago. He, like Campbell, is well to do and can and will buy more later. We had to give him personally 5% of our commission, which is 10%, to repay him for interesting his friends. We get \$185.50 interest tho to offset the \$250.00. Now the stock, if any is sold after the Dr. takes his, is to be sold at \$30.00 per share. The main trouble is going to be in keeping the people from finding out about the cheap stock advertised by the brokers. The Dr., as I said before, knows of several blocks and is buying this, only, because

it carries the prestige with it. It is impossible to get wires in here, except by telephone, and the telephone is all same Scott Valley Banking Company and they are knocking. Be careful what you wire me for that reason. Joe is still at Montague and may be able to bring the Dr. there through. I don't know much about the deal but he said yesterday he thought he could. That party is also wise to the cheap stock and just how Joe got around it I don't know. It's a hard point to cover, that I do know. I just had a talk with Joe, over the phone, and he has not closed his man as yet, but still thinks it good.

“When you get this if you do not understand exactly what the deal is write me and will explain more fully. Be careful what you write Milliken and bear me out in my statements regarding requirements necessary to become a member of the advisory board and requirements necessary to purchase stock under the syndicate agreement. Above all else get us a completed bank machine pronto. Continue to send my mail to Montague.

“Hoping to hear good news from your end of the line, I beg to remain,”

On June 22, 1912, Menefee answered this letter as is shown by Government's Exhibit No. 191, which is a

letter written by Menefee to Hunter and Hopson at Montague, California. In this letter the following statement is made:

“I appreciate the full explanation you have given me in regard to Dr. Milliken and I think the letter I wrote must have done the work properly inasmuch as you were able to close him.”

When Menefee received the letter (Government's Exhibit No. 190) from his co-defendants who were sales agents, he knew that they were attempting to defraud Dr. Milliken. The letter can admit of no other conclusion. In this letter the agent tells Mr. Menefee that he has deliberately represented to Dr. Milliken that which is not true and the entire matter is treated as a huge joke. By a fake syndicate agreement (Government's Exhibit No. 219) the stockholder is promised an earlier dividend than the rest of the stockholders will receive on account of his membership upon a so-called advisory board. The agent explains to Menefee that he has told Dr. Milliken a deliberate falsehood concerning a telegram and that he has deliberately forged a telegram for the purpose of interesting the prospective purchaser. Menefee not only wrote Hopson and thanked him for the information but over two months later Menefee wrote a letter to Mr. Bell at Las Vegas, Nevada, (Government's Exhibit No. 192) in which the following statement is made:

“We are advised by our Messrs. Hunter & Hopson that you have been considering an investment in the stock of our company and we are writing this letter, not to present an argument why you should invest, but with the idea of assuring you that Messrs. Hunter & Hunter are to be depended upon in all of their representations. They have been with the company for some time and from their record with us, as well as the record they have held for many years previous, we know them to be dependable in every way. Knowing them as we do, we have unhesitatingly authorized them to receipt for any moneys, notes or checks payable to the company with full authority to endorse notes and checks.”

The entire Milliken transaction is shown by the following exhibits:

Government's Exhibit No. 190,
Government's Exhibit No. 191,
Government's Exhibit No. 191-A,
Government's Exhibit No. 193-A,
Government's Exhibit No. 193,
Government's Exhibit No. 194,
Government's Exhibit No. 219.

The conclusion is irresistible from a reading of these documents that it was the plain intent of all parties concerned to deliberately defraud Dr. Milliken out of his money.

In a letter written to the defendant Joseph Hunter at Reno, Nevada, under date of January 30, 1913 (Government's Exhibit No. 413), the following statements are made by the defendant Menefee:

"We are trying to round out our stock selling as rapidly as possible. The fact is we have deals on at \$30.00 which will amply take care of the Company's treasury stock, and we have to handle, in order to keep the market clear, a quantity of stock for private parties, and we are trying to take off the market all we possibly can. We can handle this situation very nicely if we can rush up our miscellaneous sales in some way.

"I can not put this proposition up to very many and do not want to except in isolated places where it wont interfere with other sales and our stock selling generally. You are one of perhaps two or three that we have working for us, that we can put this confidential proposition up to, and we would not put it up to you except that you are going to a new location where I think there will not be much communication between the stockholders there and other places. If you

do not want to work the proposition in this way, all you have to do is to say so and go at it in the same old way that you have been doing.

“What I want to propose is that you could work like you did in northern California last summer at \$20.00 per share, only at that rate we would have to realize \$15.00 per share, which would only leave you a commission of 25%. This advantage in the price would rush up the business so that you would make more money at that commission than at 30% insisting on selling at \$30.00 per share.

“You understand if you work in this way that your subscriptions must be taken on the blanks that read Joseph Hunter, and your argument would be that the Company stock was practically all placed and all provided for by contracts already made with a possibility of one or two failing and having to be sold to outside parties. With such a contingency no Company stock was to be had, but that you could sell a couple hundred shares or whatever amount you think proper to work on, and then sell it as long as you had sales, regardless of whether the amount runs out or not, and the stock you sell is either some of your previous sales at that price which your people have not been able to pay for, and which you can get by turning in the money

quickly, or else that you got hold of a small block from a party that was hard up and had to realize some money, and in that way you were able to let them have the inside figure, unknown to the Company of course. As a matter of fact, this is a private matter and must not be considered as Company business.

“I do not need to say more to you as you are so used to these situations, and will readily realize whether you had better work it this way or not, and if so on what plan you want to work. Whatever plan you do adopt if you go to working this way, write me fully personally, so I will know what to say if inquiries are made.”

By a reference to the following exhibits:

Government's Exhibit No. 139, being telegram of date September 14, 1911;

Government's Exhibit No. 146, being telegram of date October 19, 1911;

Government's Exhibit No. 146-E, being telegram under date of October 19, 1911;

Government's Exhibit No. 176, being telegram of date March 7, 1912;

Government's Exhibit No. 188, being telegram of date May 1, 1912;

Government's Exhibit No. 187, being telegram of date April 24, 1912;

Government's Exhibit No. 182, being telegram of date April 11, 1912;

Government's Exhibit No. 174, being telegram of date February 28, 1912;

Government's Exhibit No. 166, being telegram of date January 16, 1912;

Government's Exhibit No. 129, being telegram of date July 3, 1911;

Government's Exhibit No. 129-b, being telegram of date July 3, 1911;

it is shown that it was the custom of the officers of the United States Cashier Company to send telegrams to the agents in the field, which telegrams were to be shown by the said agents to prospective purchasers for the purpose of influencing quick sales of stock.

By a telegram (Government's Exhibit No. 129), all agents residing in Seattle, Washington, Spokane, Washington, and Lewiston, Montana, were advised as follows:

"You are hereby authorized to sell two hundred fifty shares at twelve fifty providing applications are mailed to us by July fifth bearing date not later than July first as this block was allotted

to San Francisco agency for which settlement was not received.”

On the same day this telegram was sent, the home office wired the following telegram (Government’s Exhibit No. 129-b) to its agents residing in Oregon and California:

“You are hereby authorized to sell two hundred fifty shares at twelve fifty providing applications are mailed to us by July fifth bearing date not later than July first as this block was allotted to Montana agency for which settlement was not received.”

It will be noted that these two telegrams were sent on the same day. In the telegram first hereinabove quoted, the agents residing in Washington are advised that they may sell two hundred fifty shares of stock because the San Francisco agency has not paid for the same. In the telegram to the California agents they are advised that they can sell two hundred fifty shares at \$12.50 because the Montana agency has not paid for the same.

This is one of the many examples where the falsehoods of the officers of the United States Cashier Company made for the purpose of influencing the sale of its capital stock is demonstrated.

We have singled out these undisputed proofs of

fraud for the purpose of illustrating its magnitude and scope.

There was nothing either honest or fair about the conduct of these officers of the United States Cashier Company. They deliberately set out as shown by the proof to swindle and gouge the public. The proof of their fraud is in the record uncontradicted and unexplained. Under such circumstances the court would have almost been justified in telling the jury as a matter of law that the defendants had been engaged in a scheme to defraud the public.

THE ALLEGATION IN THE INDICTMENT THAT IT WAS A PART OF THE CONSPIRACY TO PUBLISH FALSE STATEMENTS OF THE FINANCIAL STATUS OF THE COMPANY, WAS PROVEN BY THE EVIDENCE.

We have, in this brief, found it necessary to refer to a great number of the 442 exhibits introduced in evidence at the trial by the government, all of which are now before the court by virtue of stipulation of counsel and order of the trial court as a part of the record. Concerning all of these exhibits, counsel for appellants, at page 10 of his brief, disposes of them in the following language:

“The bill of exceptions shows, following the language of the indictment, that the government

offered evidence tending to prove all these allegations. The detail of that evidence is not stated in the bill of exceptions except that a great many letters and documents introduced as exhibits in the case have been referred to in the bill of exceptions, and it is stipulated between the learned district attorney and the defendant's counsel that all of these exhibits may be deemed a part of the record and referred to in the same manner as if they had been printed in the record. So far as the case of the plaintiffs in error is concerned, it is not deemed necessary or helpful to consider these exhibits, or any other part of the record than the evidence recited in the bill of exceptions, in order to determine the validity of their assignments of error."

Yet it does appear, and it plainly appears, that a great many of these exhibits are necessary and helpful in the consideration of the several questions here involved.

We quote from page 110 of the brief of counsel for the appellants:

"We are not favored with the contentions that will be made by the district attorney, except that we have reason to believe that the evidence on the part of the government contained in the exhibits will be urged as sufficient to indicate to this court

that the defendants are in fact guilty and that the case ought not to be reversed for that reason. If such a contention shall be made, since we will have no other opportunity otherwise to reply to that contention in a brief, we simply say now that the defendants are entitled to a jury trial, with correct instructions as to the law governing them, and if error was committed it must be presumed to have been prejudicial; that we are not trying the question of the guilt or innocence of the defendants in this court, but only the question whether they have had a fair and legal trial. That is the only question for the court in any case, and particularly in this case, where the evidence on behalf of the defendants is not made a part of the bill of exceptions."

Answering the above we say that we have not quoted from the record for the purpose of showing that the appellants were guilty. We have done so for two purposes: first, to show that certain evidence was admissible, and that certain instructions were properly given and were applicable to the facts in the case; and second, for the purpose of showing that the guilt of the appellants was so plainly proven and in fact demonstrated that the verdict should not be set aside on account of technical objection.

But after counsel for the appellants have, as herein-

before quoted, stated their position broadly in this, that they have not presented the question or the guilt or innocence of their clients to this court, they then proceed at page 111 of their brief to discuss a question which bears only upon this guilt or innocence. Their excuse for doing so is that unless the matter is explained an unfavorable inference may be by this court drawn against their clients, for which reason counsel hastens to correct this impression, but at the same time remaining absolutely silent concerning all of the other many charges of fraud alleged in the indictment and substantiated by the proof as shown by repeated reference herein to the record itself. Counsel for the appellants have in this instance taken up one of the minor charges leaving all the rest absolutely unexplained.

The indictment alleged (Transcript of Record, p. 19) and the proof showed (Transcript of Record, p. 117-118), that during all of the times mentioned and stated in the indictment the United States Cashier Company, as these appellants then and there well knew, was absolutely insolvent; and the indictment alleged (Transcript of Record, p. 23), and the proof showed (Transcript of Record, p. 120) that it was a part of the conspiracy that these appellants were to publish false and untrue statements of the assets and liabilities of the United States Cashier Company, in which the assets were to be therein stated, in sums greatly in excess of the true value of said assets and in which there were to

be omitted liabilities amounting to more than the sum of one-half million dollars.

There is not one line in the entire record to either deny or to explain in any way either these allegations or this proof. Yet counsel, by argument and reference to testimony, seeks to explain these discrepancies at pages 111 to 115, inclusive, of their brief.

Heretofore in this brief we have adhered strictly to the record; for every statement of fact that we have made we have cited to the court a reference to both exhibit number and page of record; not one single assertion that we have made in this entire brief but is proven by specific reference to the record itself. Yet, now we are confronted with an invitation by counsel for the appellants to make to the court a statement which does not appear in the printed abstract of record, although it did appear in the evidence.

This invitation is made at page 114 of the brief of the appellants in the following language:

“There was evidence of discrepancies, however, in the statement of the liabilities in two, or perhaps three, instances.

“The exact amount we have not at hand, but are content that the district attorney shall state the same to the court if he choses.”

If we did not accept this invitation, the court might

assume that the discrepancies between the published statements of assets and liabilities and the true condition were of no consequence. For this reason we accept the invitation, and for the first time depart from the printed record. The facts shown by the evidence in regard to these discrepancies are:

a. In printed reports to stockholders, the alleged net worth of the corporation was figured without reference to the capital stock outstanding;

b. In a letter of date February 28, 1911, the defendant LeMonn stated that the assets of the company were \$383,696.78, and that the only liabilities were bills payable amounting to \$23,447.13. On that date the evidence showed that the United States Cashier Company owed upon its patent account \$175,000, which was not listed as a liability; that this statement was knowingly false is shown by the letter of date February 6, 1912, written by LeMonn to E. G. Howe, in which the statement is made:

“In February, 1911, the stock was advanced to \$12.50 per share, at which time our assets had grown to \$383,696.78 and our cash liabilities for patents were yet \$175,000.”

c. On August 24, 1911, the company sent a copy of Bradstreet's report to each of the agents of the company. This statement omitted a patent liability of \$113,025.21.

d. In the report of the stockholders' meeting of date

June 9, 1913, a financial statement was made as of date April 30, 1913, showing assets amounting to \$832,499.26, and liabilities amounting to \$44,673.30. This statement includes as an asset \$25,035.52 of treasury stock unsold but does not show as a liability any amount for capital stock or stock subscribed and not issued.

e. In the financial statement of date April 30, 1913, the company lists as an asset an item of \$49,755.14, being for notes taken on stock subscriptions in cases where the stock had not yet been issued and yet the statement does not include as a liability the sum of \$17,418.09 due agents as commission and \$20,227.28 due Frank Menefee.

In the statement published in the *Pacific Banker* it was stated that the company had \$250,000 on hand in its factory fund, whereas the proof showed that at that time they had less than \$500 on hand.

To elaborate upon this feature of the case seems unnecessary. Many of the facts hereinabove stated relative to these assets and liabilities are not in the printed record, although in nearly every instance the facts appear from the exhibits on file in this court.

In conclusion, we recognize that this brief has assumed too great proportions. Under ordinary circumstances we would apologize to the court for the length of the brief, but the situation is a peculiar one. In order to save the appellants the enormous expense neces-

sary and incident to the printing of all of the exhibits we stipulated with them that these exhibits might be forwarded in the original and deemed to be a part of the bill of exceptions. Had we not done this it might have been burdensome for the appellants to have presented their case to this court. For the reason that these exhibits are not set out and copied in full in the printed transcript, it has been necessary in this brief, in a great many instances, for us to not only refer to them, but copy extracts from them; thus, by reducing the size of the transcript of record, we have been compelled to enlarge upon the size of this brief.

The appellants had a fair and impartial trial. The verdict came not because of error or prejudice, but because intelligent jurors could conscientiously reach no other conclusion from the testimony before them. The situation which now confronts these appellants has not been brought about on account of error of the court or prejudice of the jury, but it is the natural consequence of their own voluntary unlawful acts.

With the hope that this brief may be of assistance to the court, it is respectfully submitted.

CLARENCE L. REAMES,

United States Attorney,

JOHN J. BECKMAN,

Assistant United States Attorney,

Attorneys for the Defendant in Error.

SUPPLEMENT

Since the within brief was printed, the case of United States vs. New South Farm and Home Company, et al., was, on April 24, 1916, decided in the Supreme Court. So many of the propositions of law discussed in this brief are settled by the decision that we have reopened our brief for the purpose of making a reference thereto.

We preface the citation with the statement that much that we have said in the within brief in support of our contention that an intent to defraud is presumed when wilful false representations are made of material matters in order to induce the payment of money could well have been eliminated if we had had before us this recent decision.

The defendants were indicted in the District Court for the Southern District of Florida, charged with having devised a scheme to defraud and with having conspired to devise and execute the said scheme. In substance, the indictment alleged that the defendants, by false representations, obtained from the public a large amount of money with the intent to defraud. A demurrer to the indictment was sustained by the District Court because, as stated by that court,

“For aught that appears in the indictment

United States of America

the lands to be obtained were worth fully as much as was to be paid by the parties purchasing; that the parties engaged in the sale were legitimately engaged in the sale of the lands. * * *

Raising the expectations of the purchaser, but giving that purchaser value received for his money but not fulfilling those expectations, is not an offense against the statute. * * *

The scheme must be one to defraud the party, or by false promises, pretenses, etc., deprive him of money or property without adequate value. Mere puffing or exaggeration of qualities, usefulness, opportunities or value of an article of commerce where the purchaser gets the article intended to be purchased and the value of the article is measured by the price paid, do not constitute the false representations, promises, etc., denounced by the statute."

The Supreme Court, in holding the indictment to be good, and reversing the action of the District Court in sustaining the demurrer, said:

'We concur in the view of the Government. The court, we think, construed the statute and misapprehended its import. Mere puffing, indeed, might not be within its meaning (of this, however, no opinion need be expressed), that is, the mere exaggeration of the qualities which the

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article has; but when a proposed seller goes beyond that, assigns to the article qualities which it does not possess, does not simply magnify in opinion the advantages which it has but invents advantages and falsely asserts their existence, he transcends the limits of 'puffing' and engages in false representations and pretenses. An article alone is not necessarily the inducement and compensation for its purchase. It is in the use to which it may be put, the purpose it may serve; and there is deception and fraud when the article is not of the character or kind represented and hence does not serve the purpose. And when the pretenses or representations or promises which execute the deception and fraud are false they become the scheme or artifice which the statute denounces. * * * We can entertain no doubt that those employing such representations, if they are false, have engaged in a scheme to defraud."

We respectfully submit that the decision above quoted is a complete answer to practically every contention made by the learned counsel for plaintiffs in error.

CLARENCE L. REAMES,

JOHN J. BECKMAN,

Attorneys for Defendant in Error.

No. 2766

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

FRANK MENEFEE, B. F. BONNEWELL, H. M. TODD and
OSCAR A. CAMPBELL,
Plaintiffs in Error,

VS.

UNITED STATES OF AMERICA,
Defendant in Error.

PETITION FOR REHEARING

Writ of Error to the District Court of the United
States for the District of Oregon.

MARTIN L. PIPES,
J. J. FITZGERALD,
JOHN F. LOGAN,
Attorneys for Plaintiffs in Error.

Filed

DEC 4 - 1916

F. D. Monckton,
Clerk

No. _____

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Writ of Error to the District Court of the United
States for the District of Oregon.

Come now the plaintiffs in error and move the
court for a rehearing, and as grounds therefor make
the following statement:

We have no desire to reargue the questions presented in our brief to which the opinion of the court is fully responsive. That brief is the best argument we can make, and if it has not been persuasive with the court, a repetition of the argument would doubtless be futile.

We first call the court's attention to a ruling of the court, over our objection, to which we respectfully contend that the opinion of the court is not responsive. That relates to the testimony of Mr. Oviatt, and is contained in the first and second assignments of error, pages 20 to 22 of our brief. It may be briefly stated that the tendency of Mr. Oviatt's testimony was to prove that he was the first inventor of the machine which Bilyeu afterwards patented; that he had made a disclosure of his invention to Bilyeu, and that Bilyeu afterwards repudiated him and got a patent in his own name. If the testimony proved what it tended to prove,—that Oviatt and not Bilyeu was the real inventor—then Oviatt would have had a cause of suit against Bilyeu to establish his rights in the invention, and perhaps hold Bilyeu as trustee for him of the patent. This transaction between Oviatt and Bilyeu occurred in 1909. The conspiracy here is alleged to have begun on the 1st of September, 1910. Under the law of conspiracy at the time Bilyeu was not the agent of any of the defendants. They were not bound by any of his conduct, nor presumed to know of the transaction. The objection made by counsel for defendants to all of the Oviatt evidence is found on pages 52 and 53 of our brief. The objection, briefly stated, was that the question of the right to this patent, as between Oviatt and Bilyeu or the defendants, could not be tried in this proceeding. In ruling upon this question, page 56 of our brief, the court below held that this particular testimony was admissible be-

cause in 1912, three years afterwards, "LeMonn made a visit East and learned of this particular instrument, and that it was being manufactured, and that he sent certain letters and certain telegrams to Mr. Menefee relative to this matter, and advised a certain course of procedure, which the evidence shows the company subsequently took, and for that purpose I think this testimony of their connection with this patent is material in this case to show their good faith."

But this court, in passing upon this objection, has apparently left out of consideration the specific testimony and the specific objection thereto, and has decided that the letters and telegrams and conduct of defendants in selling stock and selling their own stock was admissible because they had knowledge of the Payograph, a competing machine, which might affect the value of their own patent. But we submit that was not the question presented by this objection. For the purposes of this point, we may concede that the court is right in that holding, and that if the defendants sold stock after they knew that Oviatt had a machine that was valuable, and a competing machine that affected the value of their own enterprise, and which they believed would affect the value of their own enterprise, such would be a fraudulent representation of the value of their own stock and of the stock of the company. But how does that touch the question? It was the competition of the Payograph machine that the court holds

affected the value of the stock, and not that Oviatt had a better right to the patent. So that the first paragraphs of the opinion of this court, in relation to this matter, we believe are not responsive to the question that we now present. To make that apparent we quote from the opinion of the court :

“It is true that there was no substantive issue involving the validity of the Bilveu patent, but there was a vital question as to the honesty of the conduct of the defendants in offering for sale and selling shares of stock in the Cashier Company under representations mailed to various persons as to present and prospective value of the patent rights, the foundation value of such shares. This being true, if the defendants who made such representations were well advised when they put them forth that there was a *competing patented machine* on the market, or about to be marketed, and that putting the *competing device* into the market would, with reasonable certainty, mean substantial impairment of the value of the shares in the Cashier Company, which depended not upon the validity, but upon the value of the patent owned by the Cashier Company, and if despite such knowledge defendants continued their representations of value of their patent to investors, and proceeded to dispose of their own stock because of their belief that the *competing patented device* would substantially lessen the value of the Bilveu patent and shares in the Cashier Company, we believe actions and letters showing such conduct became relevant upon the issue of good

faith in the making of the representations concerning the value of the stock defendants were trying to dispose of."

So it seems to us that the court was deciding, not the question raised by the first and second assignments of error, but another and a very different question—the relevancy and admissibility of the evidence concerning the meeting of LeMonn and Oviatt in Chicago, and the letters and telegrams relating thereto.

But this court, later in the opinion, seems to touch the question, but omits therefrom an important element. We quote from the opinion:

"The question of bad faith, however, was not dependent solely upon positive proof that there was a legally established outstanding right. There might not have been an outstanding established legal right, and still, if there were claims of inventions and priority which defendants knew of and honestly believed could be established as valid, and which they believed had enough merit in them to affect the value of the patent rights owned by defendants, such a situation would have relation to the good faith of the persons making to prospective investors representations as to the value of shares, and so would have decided bearing upon the allegations of the indictment charging fraud and deceit in the representations made to the investing public as to the value of the devices made, or to be made, under the patents to which defendants asserted, or had, ownership."

In that statement the court, if it refers to Oviatt's claim of priority to the invention, assumes what is not true, that the other defendants knew about that claim or honestly believed that Oviatt had a claim that might be established as valid. The record shows that the contrary is true. As we have already indicated, no knowledge of that claim is imputed to the defendants, or could be imputed to them, when the testimony was offered by reason of the transactions occurring between Oviatt and a co-conspirator, because Bilyeu was not even charged in the indictment to have been a conspirator at that time. If the defendants were to be affected by that transaction, knowledge of it at the time they made their representations would have to be shown by proof. It has not been contended or pretended, in the record of the court below nor in this court, that in the transactions of the defendants concerning the Payograph they had any knowledge of the supposed infirmity of the Bilyeu patent on account of Oviatt's claim. The testimony concerning that is found on pages 174, *et seq.*, and particularly the interview between Le Monn and Oviatt on pages 179, *et seq.*, Transcript of Record. There is no intimation contained in the testimony anywhere that any of the defendants knew of Oviatt's claim to the patent right, or that it could affect injuriously their own patent. The whole thing went upon the question of competition.

It follows that the evidence objected to was not relevant to any issue in the case. That it was highly prejudicial can admit of no sort of doubt.

As to the Sewell testimony, the court holds that the effect of the instructions of the court was to take out of the case all of the Sewell testimony except those explanations which bore upon the mechanical features, and the state of the art before and at the time the defendants made representations to investors, or others who might be purchasers of the stock in the Cashier Company. But is that the effect of the instructions? It is not the effect of the instructions, if the authorities we cited in our brief upon that question are to prevail. Let it be remembered that there were a great many patents cited against the patents of the defendants to which Mr. Sewell testified. The court, in its instruction, said nothing about these citations directly and specifically. What the court said in the instructions, for instance, is this:

“But if at the time these representations were made the company did in fact have patents, issued by the Patent Office of the United States, for any of the machines, the representations, so far as that particular machine was concerned, would not be false.”

Of course that is obvious. And then the court said:

“Bad faith or fraudulent misrepresentations cannot be imputed to the defendants in respect of patents in fact issued, and owned by them, or in respect to claims that are in fact allowed because of some *alleged infringement*.”

That sentence does not refer to the citations. Again the court said:

“There is a presumption of law that, where a patent is issued by the United States Patent Office, it does not infringe any known patent and a patentee in accepting such patent is not thereby guilty of bad faith.”

That does not refer to the citations offered in evidence. And it might be true that this presumption of law exists, but it is only a presumption, and the jury might well infer from this record that that presumption was overcome by the fact that the department made citations of prior patents. The court again said:

“You are not called upon to decide in this case whether the patents issued or the claims allowed were in fact an infringement of some invention or patent, or were dominated or affected injuriously by the Osborne and Lindeloff or the Cook patents, or any previous invention, and the evidence of the witness Sewell to that effect should be disregarded.”

The court has agreed with us that Mr. Sewell's opinion about the injurious effect of these antecedent inventions was improperly allowed, but his opinion concerning their influence is all that went out under this instruction. The citations remained.

As to the effect of these citations, the court had explicitly ruled upon their effect, which ruling re-

mains in the case, we believe, unaffected by these general instructions. On page 76 of our brief Mr. Sewell testified that nobody in the patent office gave an opinion to Mr. Bilyeu about the dominating control referred to, whereupon counsel for the defendants said: "I think I am entitled to have that out, for it did not go to Mr. Bilyeu." The court said: "I understand they notified him of this prior patent." Counsel for defendant said: "They did not notify him of the witness' opinion as an expert, because it was not their duty to give him that opinion." And then the court said: "That is clear, but they did notify him of the patent—of the prior patent." Counsel for defendants: "Yes, they cited the patent." And the court said: "And advised him of that, so he knew there was such a patent, and he took his own chances with reference to disposition."

Now, the instructions of the court did not withdraw that evidence from the jury in any explicit way. So that although Mr. Sewell's opinion that some of these previous citations dominated the Bilyeu patent goes out, there is left in the record and in the minds of the jury the fact that the Government at Washington had cited to the defendants these prior patents and the language of the court, in their hearing, that the defendants took their chances upon the disposition of their own patent.

In respect of this matter the court has not responded to the argument of our brief and the authorities there cited that a general instruction of this kind does not cure the error in admitting the evi-

dence. In addition to the authorities cited in our brief, we add another Oregon case.

State vs. Rader, 62 Or. 37.

Respectfully submitted,

MARTIN L. PIPES,

JOHN F. LOGAN,

J. J. FITZGERALD,

Attorneys for Plaintiffs in Error.

I hereby certify that I am counsel for the plaintiffs in error in the foregoing petition for rehearing; that in my judgment it is well founded, and that it is not interposed for delay.

MARTIN L. PIPES.

United States
Circuit Court of Appeals
For the Ninth Circuit.

EDWARD WHITE, as Commissioner of Immigration
at the Port of San Francisco,
Appellant,

vs.

TOM YUEN,
Appellee.

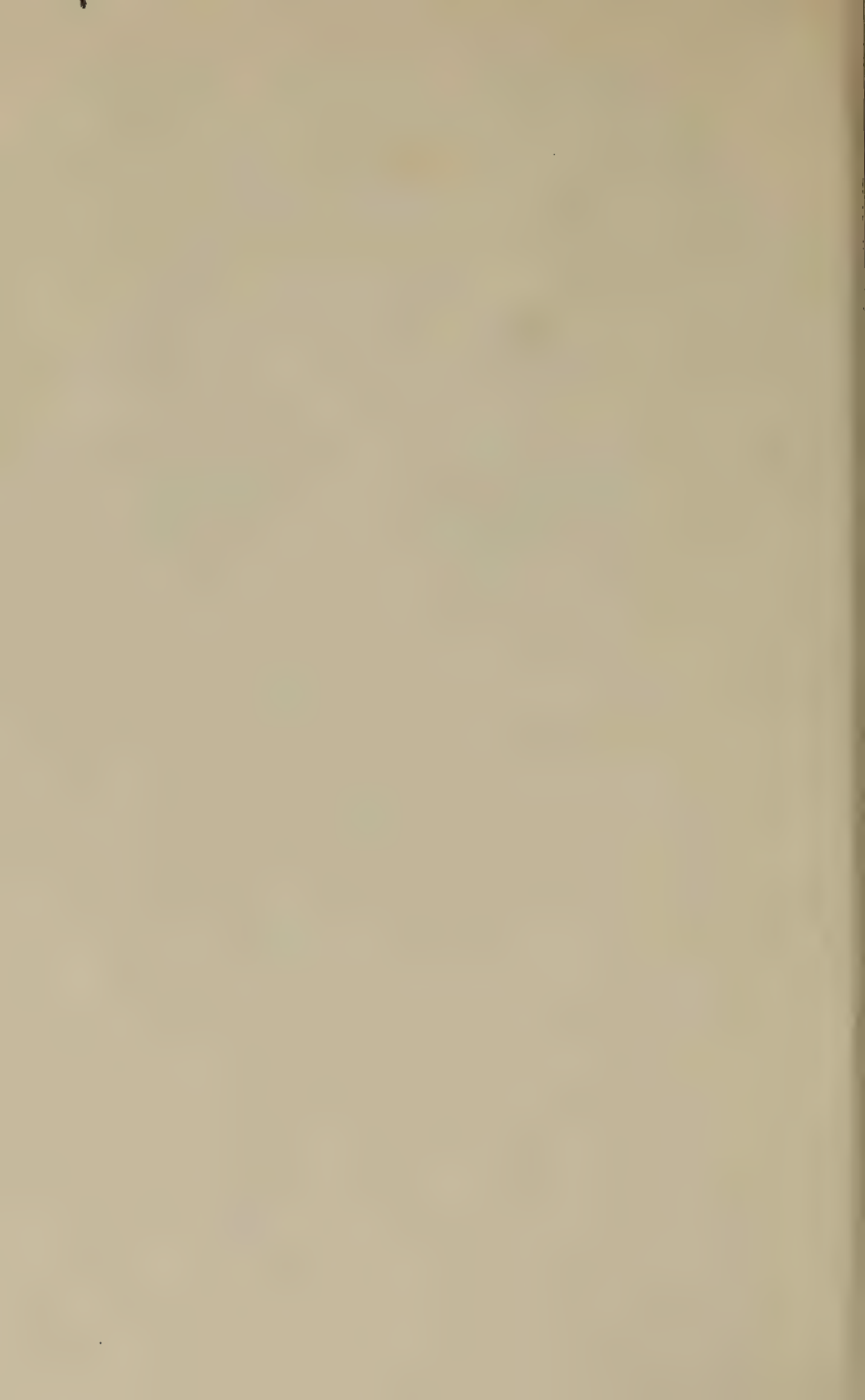
Transcript of Record.

Upon Appeal from the United States District Court for
the Northern District of California,
First Division.

Filed

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F. D. Mouckton,
Clerk,



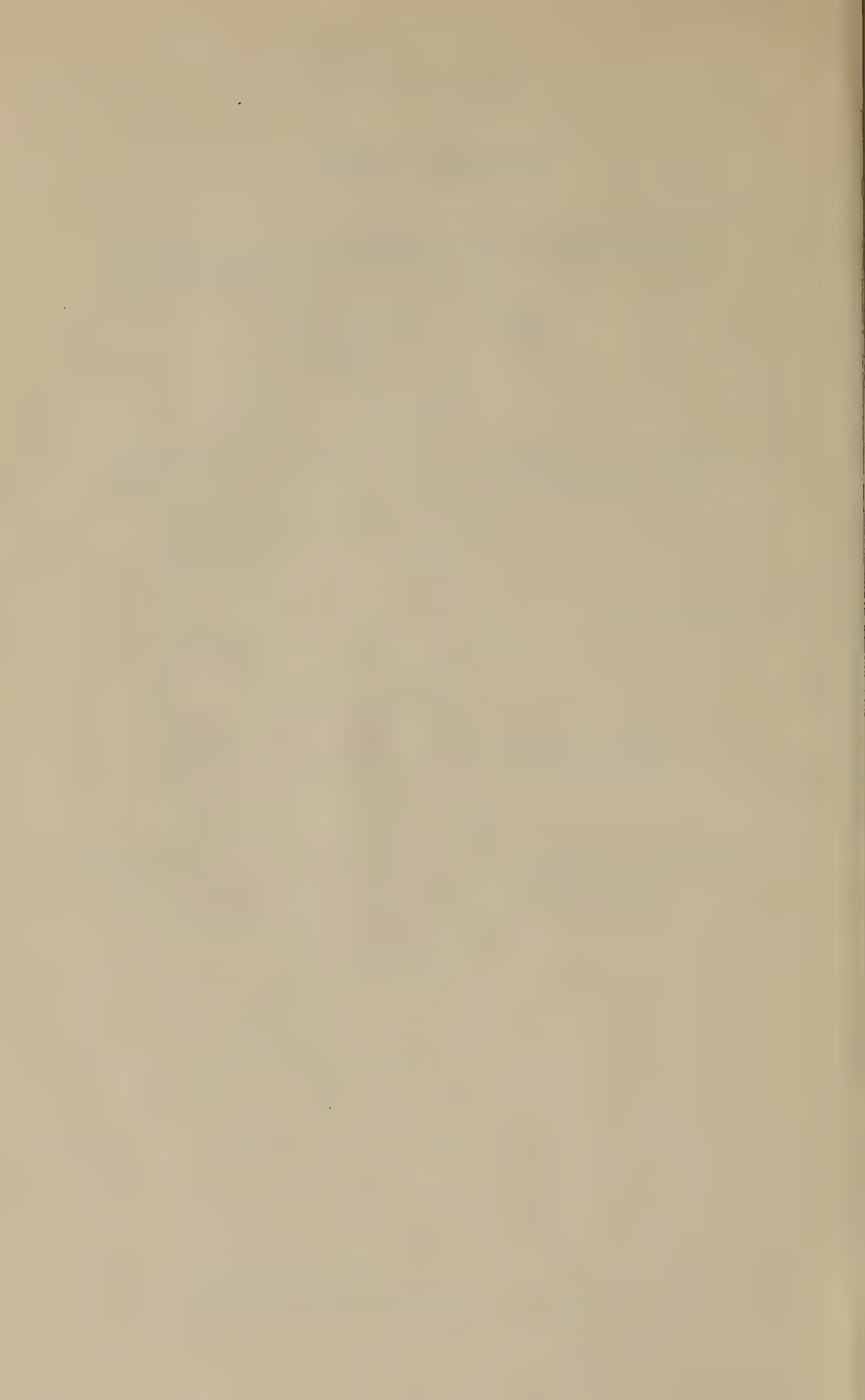
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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*In the District Court of the United States, for the
Northern District of California.*

No. 15,933.

In the Matter of TOM YUEN, on Habeas Corpus.

[Names and Addresses of Attorneys of Record.]

ATTORNEYS FOR,

For Petitioner and Appellee:

FRANK STEWART, JOHN L. McNAB and
TIMOTHY HEALY, San Francisco, Calif.

For Respondent and Appellant:

JOHN W. PRESTON, U. S. Attorney, and
CASPER A. ORNBAUM, Asst. U. S. Attorney.

*In the District Court of the United States, in and for
the Northern District of California, First Division.*

No. 15,933.

In the Matter of the Application for a Writ of
Habeas Corpus in Behalf of TOM YUEN.

Praecipe [for Transcript of Record].

To the Clerk of said Court:

Please prepare for use as transcript on the Appeal
in the above entitled and numbered case, the following:

1. Petition for Writ of Habeas Corpus, consisting
of the first five pages thereof, thus omitting
exhibits "A" and "B."
2. Order to Show Cause.

3. Marshal's Return of Service of the Order to Show Cause.
4. Demurrer to Petition.
5. Opinion and Order Overruling Demurrer and Ordering Writ to Issue.
6. Writ of Habeas Corpus and Marshal's Return of Service thereof.
7. Return to Petition and Stipulation set forth on last page of said Return.
8. Order Discharging Petitioner.
9. Petition for Appeal.
10. Assignment of Petitioners.
11. Order Allowing Appeal.
12. Notice of Appeal.
13. Stipulation of Attorneys and Order of the Court Transferring the Record of the Bureau of Immigration known as respondent's exhibit "A" to the U. S. Circuit Court of Appeals for the 9th Circuit, to be considered in its original form and without being transcribed, as a part of the Government's Return to said petition for Writ of Habeas Corpus and Order to Show Cause.

Dated this 22d day of March, A. D. 1916.

JNO. W. PRESTON,
United States Attorney.
CASPER A. ORNBAUM,
Asst. U. S. Attorney.

Receipt of a copy of the within praecipe is hereby acknowledged this 22d day of March, 1916.

JOHN L. McNAB,
TIMOTHY HEALY,
Attorneys for Appellee.

[Endorsed]: Filed Mar. 23. 1916. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [1*]

*In the District Court of the United States, in and for
the Northern District of California, First Division.*

In the Matter of the Application for a Writ of
Habeas Corpus in Behalf of TOM YUEN.

Affidavit and Petition (for Writ of Habeas Corpus).
To the Honorable M. T. DOOLING, Judge of said
Court:

Your petitioner, Tom Yuen, being duly sworn, on
oath deposes and says:

That he is unlawfully imprisoned and restrained
of his liberty by Edward White, Commissioner of
Immigration at the city and county of San Francisco,
in said District, under and by virtue of a warrant
of deportation heretofore issued by the Secretary of
Labor of the United States, a copy of which said
warrant is attached hereto, hereby referred to, made
a part hereof and marked exhibit "A."

That said imprisonment and restraining of his
liberty of said petitioner, Tom Yuen, is unlawful in
this:

*Page-number appearing at foot of page of original certified Record.

1. That the said Secretary of Labor of the United States had no jurisdiction over the person of your petitioner and no jurisdiction or authority to issue said warrant.

2. That said Secretary of Labor exceeded his jurisdiction and authority and all jurisdiction and authority conferred upon him by law in and by issuing said warrant of deportation. [2]

3. That your petitioner was not given a fair and impartial trial and hearing by the Immigration Officers of the United States precedent to the issuing of said warrant of deportation and upon which said warrant is purported to be based; all of which will more fully appear by the attached record of the testimony and proceedings given and adduced at said hearing, which said record is hereby referred to, made a part hereof and marked exhibit "B."

That said Secretary of Labor did not have jurisdiction of the person of your petitioner or of this case in this: That there was no evidence that your petitioner entered the United States within three years next preceding the date of his arrest by the Immigration Officers, and that your petitioner is, and at all times herein mentioned and referred to, was a Chinese laborer, lawfully domiciled and residing in the United States, he having registered as such Chinese laborer at New York, New York, on March 2, 1894, and at all times thereafter being the legal owner and actual holder of Chinese Laborer's Certificate of Residence No. 28,667, and on said date of his arrest he had said Certificate of Residence in his possession in the city of Los Angeles, California,

when same was taken from him by the United States Immigration Officials, and that said Certificate is now wrongfully withheld from your petitioner by said officials.

That said Secretary of Labor had no jurisdiction to issue the said warrant (exhibit "A") directing that your petitioner be deported to China, as there is no evidence that your petitioner came from China into the United States, at any time during the past thirty-five years. [3]

That said Secretary of Labor exceeded the jurisdiction and authority conferred upon him by law in this:

That said Secretary of Labor had not, at any time, any jurisdiction or authority to issue said warrant for the deportation of your petitioner, he being at the time of said issuance of said warrant of deportation, and at all other times herein mentioned and referred to, a Chinese laborer, regularly and lawfully holding a Chinese Laborer's Certificate of Residence, and lawfully being and residing in the United States by virtue of said Certificate of Residence.

That said trial and hearing, and proceedings for the deportation of your petitioner, were unfair in this:

That the testimony and evidence adduced at said hearing which is contained in exhibit "B" hereto attached, was and is insufficient and inadequate to permit or justify said Secretary of Labor in issuing said warrant of deportation, or justify the deportation of your petitioner; and that the conclusions of law on the part of said Secretary of Labor and other

Immigration Officials from the facts adduced at said hearing are erroneous and not sustained by said testimony and evidence in this, that said testimony and evidence show that your petitioner is, and at all times mentioned herein was, a Chinese laborer lawfully domiciled and residing in the United States, holding and owning a genuine Chinese Laborer's Certificate of Residence; and that there is no testimony that your petitioner entered the United States within three years prior to his arrest; and there is no testimony that he entered the United States without inspection, as alleged in said warrant of deportation.

That said hearing was further unfair and illegal in this: That certain of said testimony set forth in exhibit "B" hereto attached, was not given in the presence or hearing of [4] your petitioner or his counsel.

That said hearing was also unfair in this: That testimony was received against your petitioner in the nature of unsworn statements by persons in Mexico, prior to the arrest and hearing of petitioner, whom your petitioner had no opportunity to meet, see or cross-examine; and there was no evidence adduced showing that your petitioner is the identical person referred to in said unverified statements.

Your petitioner further states that said warrant of deportation, exhibit "A" attached hereto, is void in law and absolutely invalid in that it directs the deportation of your petitioner to China, contrary to the law and the evidence affecting this matter; and for the further reason that it does not appear therein

and cannot be ascertained therefrom, on what grounds or for what reason your petitioner is alleged to be unlawfully in the United States.

That your petitioner is lawfully within the United States, and is the owner of and entitled to the possession of said Certificate of Residence.

That a copy of said warrant of arrest, upon which the said proceedings are based, and were conducted as aforesaid, is hereunto attached, hereby referred to, made a part hereof and marked exhibit "C."

WHEREFORE, your petitioner prays that a Writ of Habeas Corpus be issued, directed to said Edward White, Commissioner of Immigration at San Francisco, California, in order that the cause of the detention of said petitioner may be inquired into and for such further order of Court as may be found proper.

FRANK STEWART,

JOHN L. McNAB,

TIMOTHY HEALY,

Attorneys for Petitioner, [5]

State of California

City and County of San Francisco,

Northern District of California,—ss.

Tom Yuen, being first duly sworn, deposes and says:

That he is the petitioner named in the foregoing Petition that he has read the said Petition, or the same has been read to him, and knows the contents thereof and that the same is true of his own knowledge and belief, except as to the matters which are

therein stated on his information and belief, and as to those matters he believes it to be true.

TOM (Chinese Characters) YUEN,

Subscribed and sworn to, before me, this 23 day of November 1915.

[Seal]

E. L. KIMMEL,

Notary Public in and for the City and County of San Francisco, State of California.

(Exhibits "A" and "B," which were here attached to the Original Petition, have been omitted from this Copy pursuant to Praecipe.)

[Endorsed]: Filed Nov. 23, 1915. W. B. Maling, Clerk, By C. W. Calbreath, Deputy Clerk. [6]

In the District Court of the United States, in and for the Northern District of California, First Division.

No. (15,933.)

In the Matter of the Application for a Writ of Habeas Corpus in Behalf of TOM YUEN.

Order to Show Cause.

Upon consideration of the petition filed in the above-entitled cause, it is ordered that the respondent, the Commissioner of Immigration at the Port of San Francisco, show cause in this court at the courtroom thereof in the city and county of San Francisco, at 10 o'clock A. M., on Saturday, the 27 day of November, 1915, why the writ of habeas corpus should not issue as prayed for by the petitioner herein.

Let a copy of this order be served forthwith upon said respondent and upon the United States Attorney for this District and it is

FURTHER ORDERED that deportation of said petitioner be and the same is hereby stayed until the further order of this Court, and it is ——

Dated November 23, 1915.

M. T. DOOLING,
Judge of the District Court.

[Endorsed]: Filed Nov. 23, 1915. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [7]

(Marshal's) Return on Service of Writ.

United States of America,
Northern District of California,—ss.

I hereby certify and return that I served the annexed Order to Show Cause on the therein-named Commissioner of Immigration at the Port of San Francisco by handing to and leaving a true and correct copy thereof with Edward White, Commissioner of Immigration personally at San Francisco, in said District, on the 23d day of November, A. D. 1915.

J. B. HOLOHAN,
U. S. Marshal.
By Lawrdence J. Conlon,
Deputy. [8]

*In the District Court of the United States, in and for
the Northern District of California, First Division.*

No. 15,933.

In the Matter of the Application for a Writ of
Habeas Corpus in Behalf of TOM YUEN.

Demurrer to Petition for Writ of Habeas Corpus.

Now comes the respondent, Edward White, Commissioner of Immigration at the Port of San Francisco, in the State and Northern District of California, and demurs to the petition for a writ of Habeas Corpus in the above-entitled cause and for grounds of demurrer alleges.

I.

That the said petition does not state facts sufficient to entitle petitioner to the issuance of a writ of habeas corpus, or for any relief thereon;

II.

That said petition is insufficient in that the statements therein relative to the record of the testimony taken on the trial of the said applicant are conclusions of law and not statements of the ultimate facts.

WHEREFORE, Respondent prays that the writ of habeas corpus be denied.

JNO. W. PRESTON,

U. S. Attorney.

CASPER A. ORNBAUM,

Asst. U. S. Attorney,

Attorneys for Respondent.

[Endorsed]: Filed Nov. 27, 1915. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [9]

*In the District Court of the United States, in and
for the Northern District of California, First
Division.*

No. 15,933.

In the Matter of TOM YUEN on Habeas Corpus.

**(Opinion and Order Overruling Demurrer, and
Ordering Writ to Issue.)**

JOHN L. McNAB, Esq., and TIMOTHY
HEALY, Esq., Attorneys for Petitioner.

JOHN W. PRESTON, Esq., United States
Attorney and CASPER A. ORNBAUM,
Esq., Assistant United States Attorney,
Attorneys for Respondent.

**ON DEMURRER TO PETITION FOR A WRIT
OF HABEAS CORPUS.**

Petitioner is a Chinese laborer who has been in this country for many years. He was registered in New York on March 2d, 1894, and at that time received a Chinese laborer's certificate of residence which he had in his possession at the time of the hearing which led to the order of deportation that he is contesting in this proceeding. He has had no hearing before a Commissioner or Court. The proceedings leading to the order for his deportation were had before an Immigration Inspector, on the theory that sometime in December, 1914, and January, 1915, he was in Juarez, Mexico, and that there-

fore he must have entered this country within three years. To establish that fact the statement of one Acosta is relied upon. Acosta who is a police officer in Juarez, Mexico, in an *ex parte* statement before an Inspector in [10] El Paso, declared that he recognized a photograph shown him as that of a Chinese whom he had seen in Juarez in the latter part of December, 1914, and the early part of January, 1915. The photograph shown him is a photograph of petitioner. Unless petitioner has entered the United States within three years of the date of the hearing he may not be deported except after a hearing before a Commissioner, with the right of appeal to the Court. I have had occasion to hold before this, that the fact which gives jurisdiction to the Immigration Officers to hear and determine these matters, that his entry into the United States within three years, cannot be established by *ex parte* statements of witnesses in Mexico, who base their statements upon photographs, and are never confronted by the alien sought to be deported. In the absence of fair proof of such entry within three years the only tribunals that can order the deportation of a Chinese laborer are the Commissioners and the Courts. I think the right of a laborer who has been long in this country to remain here is too important a right to be taken from him upon the *ex parte* statement of a resident of a foreign country who is never produced before him.

The demurrer to the petition will be overruled and

the writ will issue returnable December 18th, 1915,
at 10 o'clock A. M.

December 13, 1915.

M. T. DOOLING,
Judge.

[Endorsed]: Filed Dec. 13, 1915. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [11]

*In the District Court of the United States, in and
for the Northern District of California, First
Division.*

No. 15,933.

In the Matter of TOM YUEN, on Habeas Corpus.

Writ of Habeas Corpus.

*To the President of the United States of America,
to the Commissioner of Immigration, Port of
San Francisco, Calif., Angel Island, Calif.,
Greeting:*

YOU ARE HEREBY COMMANDED that you
have the body of the said person by you imprisoned
and detained, as it is said, together with the time
and cause of such imprisonment and detention, by
whatsoever name the said person shall be called or
charged, before the Honorable M. T. Dooling, Judge
of the District Court of the United States, for the
Northern District of California, at the courtroom of
said court, in the city and county of San Francisco,
California, on the 18th day of December, A. D. 1915,
at 10 o'clock A. M., to do and receive what shall then
and there be considered in the premises.

AND HAVE YOU THEN AND THERE THIS WRIT.

WITNESS, the Honorable M. T. DOOLING, Judge of the Said District Court, and the Seal thereof at San Francisco, in said District, on the 13th day of December, A. D. 1915.

[Seal]

WALER B. MALING,
Clerk.

By C. W. Calbreath,
Deputy Clerk. [12]

Return on Service of Writ.

United States of America,
Northern District of California,—ss.

I hereby certify and return that I served the annexed Writ of Habeas Corpus on the therein named Commissioner of Immigration at Angel Island, by handing to and leaving a true and correct copy thereof with Edward White, Commissioner of Immigration at Angel Island, personally, at San Francisco, in said District, on the 14th day of December, A. D. 1915.

J. B. HOLOHAN,
U. S. Marshal.

By Lawrence J. Conlon,
Officer Deputy.

[Endorsed]: Filed Dec. 15, 1915. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [13]

*In the District Court of the United States, in and
for the Northern District of California, First
Division.*

No. 15,933.

In the Matter of the Application for a Writ of
Habeas Corpus in Behalf of TOM YUEN.

Return to Order to Show Cause.

Now comes Edward White, Commissioner of Immigration at the Port of San Francisco, by Charles D. Mayer, Immigrant Inspector, and in return to the order to show cause issued by the said Court on the petition of Tom Yuen for a Writ of Habeas Corpus, admits, denies and alleges as follows:

ADMITS that the said Tom Yuen is imprisoned and restrained of his liberty by said Edward White, Commissioner of Immigration at the Port of San Francisco, under and by virtue of a warrant of deportation heretofore issued by the Secretary of Labor of the United States; DENIES that said imprisonment and restraint, or imprisonment or restraint of the said Tom Yuen is unlawful; DENIES that the said Secretary of Labor had no jurisdiction over the person of petitioner, Tom Yuen, and further DENIES that he had no jurisdiction or authority to issue said warrant; DENIES that the said Secretary of Labor exceeded his jurisdiction and authority, or jurisdiction or authority conferred upon him by law in and by, or in or by issuing said warrant of deportation, or at all;

DENIES that petitioner was not given a fair and impartial trial and hearing, or trial or hearing, by the Immigration officers of the United States, precedent to the issuing of said warrant of deportation; DENIES that the said Secretary of Labor did not have jurisdiction over the person of said petitioner, or of this case, [14]

DENIES that there was no evidence that said petitioner entered the United States within three years next preceding the date of his arrest by the Immigration Officers and in this connection respondent alleges that the evidence taken and had in the above-entitled matter states that the said petitioner entered the United States from Mexico within three years from the date of his arrest and hearing in said matter.

ADMITS that your petitioner is and was at all times herein mentioned and referred to a Chinese laborer, but DENIES that he is lawfully domiciled and residing, or domiciled or residing in the United States; ADMITS that said petitioner registered as a Chinese laborer at New York on March 2, 1894, but DENIES that at all times thereafter said petitioner was the legal owner and actual holder of Chinese Laborer's Certificate of Residence, No. 28,667, and in this connection respondent alleges that at some time prior to his arrest by the said Immigration Officers, on or about the 3d day of August, 1915, he left the United States and entered Mexico without securing a Chinese Laborer's Return Certificate, under the provisions of the Treaty, Laws, Rules and Regulations Governing the Admis-

sion of Chinese into the United States; that by reason of the said petitioner leaving the United States, respondent further alleges that petitioner ceased to be the legal owner and holder, or legal owner or holder of the said Chinese Laborer's Certificate of Residence No. 28,667, or the legal owner or holder of any other Chinese Certificate of Residence,

DENIES that the said Secretary of Labor had no jurisdiction to issue said warrant, as set forth in said Petitioner's Exhibit "A," directing the said petitioner to be deported to China. [15]

DENIES that the testimony and evidence, or the testimony or evidence adduced at the said hearing, which is contained in said Petitioner's Exhibit "B" was and is, or was or is insufficient and inadequate, or insufficient or inadequate to permit or justify said Secretary of Labor in issuing said warrant of deportation, or justified the deportation of said petitioner,

DENIES that the conclusions of law on the part of the said Secretary of Labor and other Immigration Officials, or the Secretary of Labor, or other Immigration Officials from the facts adduced at said hearing or otherwise, are erroneous and not sustained by said testimony and evidence, or said testimony or evidence,

DENIES that said testimony and evidence, or said testimony or evidence show that petitioner is and at all times mentioned in said petition was a Chinese laborer lawfully domiciled and residing, or lawfully domiciled or residing in the United States, holding and owning a genuine Chinese Laborer's

Certificate of Residence.

DENIES that there is no testimony that said petitioner entered the United States without inspection, as alleged in said warrant of deportation, and in this connection respondent alleges that said petitioner did enter the United States from Mexico without inspection within three years prior to his arrest.

DENIES that said hearing was unfair and illegal, or unfair or illegal, because of certain, or any, of said testimony set forth in said Petitioner's Exhibit "B" was not given in the presence or hearing of petitioner or his counsel. [16]

DENIES that said warrant of deportation, set forth in exhibit "A" by petitioner is void in law and absolutely invalid or void, or invalid, in that it directs the deportation of said petitioner to China, or otherwise;

DENIES that said warrant of deportation is void or invalid for the reason that it does not appear therein and cannot be ascertained, or that it does not appear therein or cannot be ascertained therefrom on what grounds or for what reasons said petitioner is alleged to be unlawfully in the United States, and in this connection respondent alleges that the grounds and the reasons for petitioner being unlawfully in the United States are set forth in the said warrant of deportation, as follows: That said petitioner entered the United States in violation of section 7, Chinese Exclusion Act of September 13, 1888, being a Chinese laborer who failed to produce to the proper officer the Return Certificate required by said section.

DENIES that petitioner is lawfully within the United States and is the owner of, and entitled to the possession of said Certificate of Residence, or is lawfully within the United States, or is the owner of, or entitled to the possession of said Certificate of Residence.

As a further, separate and distinct answer and defense to the petition on file herein, respondent alleges:

That since the arrest of said petitioner, as set forth in the answer hereinabove referred to, certain hearings have been conducted in behalf of said petitioner, and testimony and other evidence has been taken concerning the right of said petitioner to be and remain in the United States; that said hearings were conducted and the testimony and other evidence taken by the said Immigration Officials acting for and on behalf of the Government of the United States, and that all of the said evidence and other testimony given and taken at said hearing was and is recorded by the said Immigration Officials in a record known as the Immigration [17] Record in the case of Tom Yuen; that said testimony and other evidence, and all of the exhibits that were considered with the said record and the said record are incorporated into and made a part of this answer and are on file herewith.

WHEREFORE, respondent prays that said petition for writ of habeas corpus be denied and the order to show cause be discharged and that said alien be remanded to the custody of the respondent for deportation, as provided for in said warrant of

deportation heretofore issued by said Secretary of Labor of the United States, and for such other and further relief as to this Court may seem just and equitable.

JNO. W. PRESTON,
U. S. Attorney.
CASPER A. ORNBAUM,
Asst. U. S. Attorney. [18]

United States of America,
Northern District of California,
City and County of San Francisco,—ss

Charles D. Mayer, being first duly sworn, deposes and says: That he is a Chinese and Immigrant Inspector connected with the Immigration Service for the Port of San Francisco, and has been specially directed to appear for and represent the respondent, Edward White, Commissioner of Immigration, in the within entitled matter; that he is familiar with all of the facts set forth in the within Return to Petition for Writ of Habeas Corpus and knows the contents thereof; that it is impossible for the said Edward White to appear in person or to give his attention to said matter; that of affiaint's own knowledge the matters set forth in the Return to the Petition for Writ of Habeas Corpus are true, excepting those matters which are stated on information and belief, and that as to those matters, he believes it to be true.

CHARLES D. MAYER.

Subscribed and sworn to before me this 18th day
of December, A. D., 1915.

[Seal]

T. L. BALDWIN,
Deputy Clerk U. S. District Court Northern District
of California. [19]

*In the District Court of the United States, in and
for the Northern District of California, First
Division.*

No. 15,933.

In the Matter of the Application for a Writ of
Habeas Corpus in Behalf of TOM YUEN.

**Stipulation (That Testimony, Exhibits, etc., May be
Considered Part of the Return).**

It is hereby stipulated and agreed by and between
the attorneys for the respective parties in the
above-entitled matter that the testimony, evidence,
exhibits and record referred to herein may be con-
sidered, and the same are a part of this Return with-
out being attached thereto.

JNO. W. PRESTON,

U. S. Attorney.

CASPER A. ORNBAUM,

Asst. U. S. Attorney.

JOHN L. McNAB,

TIMOTHY HEALY,

Attys. for Petitioner.

[Endorsed]: Filed Dec. 18, 1915. W. B. Mal-
ling, Clerk. By Lyle S. Morris, Deputy. [20]

[Order Discharging Petitioner from Custody.]

*In the District Court of the United States, in and for
the Northern District of California, First Division.*

No. 15,933.

In the Matter of TOM YUEN, on Habeas Corpus.

JOHN L. McNAB, Esq., and TIMOTHY
HEALY, Esq., Attorneys for Petitioner.

JOHN W. PRESTON, Esq., United States At-
torney and CASPER A. ORNBAUM, Esq.,
Assistant United States Attorney, Attor-
neys for Respondent.

(ORDER THE PETITIONER BE DIS-
CHARGED.)

Upon the overruling of the demurrer to the petition herein, a writ of habeas corpus was issued to which a return has been filed. No new matter is thereby presented, and therefore, for the reasons given upon the overruling of the demurrer, it is ordered that the petitioner be discharged from custody.

December 20th, 1915.

M. T. DOOLING,
Judge.

[Endorsed]: Filed Dec. 20, 1915. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [21]

[Order Discharging Petitioner from Custody.]

*In the District Court of the United States, Northern
District of California.*

No. 15,933.

In the Matter of TOM YUEN, on Habeas Corpus.

(ORDER OF DISCHARGE.)

This matter having been regularly brought on for hearing upon the issues joined herein, and the same having been duly heard and submitted, and due consideration having been thereon had, it is by the Court now here ordered, that the said named person in whose behalf the Writ of Habeas Corpus was sued out, is illegally restrained of his liberty, as alleged in the petition herein, and that he be, and he is hereby discharged from the custody from which he has been produced, and that he go hence without day.

Entered this 20th day of December, 1915.

[Seal]

W. B. MALING,
Clerk.

By C. W. Calbreath,
Deputy Clerk.

[Endorsed]: Filed Dec. 20, 1915. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [22]

*In the District Court of the United States, in and for
the Northern District of California, First Division.*

No. 15,933.

In the Matter of TOM YUEN, on Habeas Corpus.

Petition for Appeal.

To the Honorable M. T. DOOLING, Judge of the
District Court of the United States, for the
Northern District of California:

Edward White, as Commissioner of Immigration at the Port of San Francisco, appellant herein, feeling aggrieved by the Order and Judgment made and entered in the above-entitled cause on the 20th day of December, A. D. 1915, discharging Tom Yuen from the custody of said appellant, does hereby appeal from said Order and Judgment to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons set forth in the Assignment of Errors filed therewith.

WHEREFORE, petitioner prays that his appeal be allowed and that citation be issued, as provided by law, and that a transcript of the record, proceedings, and documents, and all of the papers upon which said Order and Judgment were based, duly authenticated, be sent to the United States Circuit Court of Appeals for the Ninth Circuit, under the rules of such Court, and in accordance with the law in such case made and provided. [23]

Dated this 14th day of March, A. D. 1916.

JNO. W. PRESTON,

United States Attorney.

CASPER A. ORNBAUM,

Asst. United States Attorney.

Service of the within Petition for Appeal by copy admitted this —— day of March, 1916.

JOHN L. McNAB,

TIMOTHY HEALY,

Attorneys for Appellee.

[Endorsed]: Filed Mar. 15, 1916. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [24]

*In the District Court of the United States, in and for
the Northern District of California, First Division.*

No. 15,933.

In the Matter of TOM YUEN, on Habeas Corpus.

Assignment of Errors.

Now comes Edward White, Commissioner of Immigration at the Port of San Francisco, respondent in the above-entitled cause, and appellant in the appeal to the United States Circuit Court of Appeals, taken herein, by his attorneys, John W. Preston, United States Attorney, and Casper A. Ornbaum, Assistant United States Attorney, and files the following Assignment of Errors upon which he will rely in the prosecution of his appeal in the above-entitled cause, to the United States Circuit Court of Appeals for the Ninth Circuit, from the Order and Judgment made by this Honorable Court on the 20th

day of December, A. D. 1915.

I.

That the Court erred in granting the Writ of Habeas Corpus and discharging the alien, Tom Yuen, from the custody of Edward White, the said Commissioner of Immigration;

II.

That the said Court erred in holding that it had jurisdiction to issue the Writ of Habeas Corpus in the above-entitled cause, as prayed for in the petition of the said Tom Yuen for a Writ of Habeas Corpus.

III.

That the Court erred in holding that the allegations [25] contained in said petition for a Writ of Habeas Corpus were sufficient in law to justify the granting and issuing of a Writ of Habeas Corpus.

IV.

That the Court erred in finding that the evidence upon which the Secretary of Labor issued the warrant in deportation for the said Tom Yuen was insufficient in character.

V.

That the Court erred in holding that the entry of Tom Yuen into the United States from Mexico within three years could not be established by *ex parte* statement of a witness whose only means of identification of the said Tom Yuen was by a photograph shown to him by the Immigration Officers.

VI.

That the Court erred in holding that the said Tom Yuen was illegally restrained of his liberty by Edward White, Commissioner of Immigration, and that

the evidence taken in the hearing of this case, under the Immigration Act of February 20, 1907, as amended by the Acts of March 26, 1910, and March 4, 1913, and the Chinese Exclusion Laws, was insufficient to justify the said respondent, as Commissioner of Immigration, to detain or deport the said Tom Yuen.

VII.

That the Court erred in discharging the said alien, Tom Yuen, from the custody of the said Edward White, Commissioner of Immigration, at the Port of San Francisco, and appellant herein.

WHEREFORE, appellant prays that the said Order and Judgment of the United States District Court, in and for the Northern District of California, made and entered herein, in the office of the clerk of the said court, on the 20th day of December, A. D. 1915, setting aside the Return to the Petition for a Writ of [26] Habeas Corpus, and discharging the said Tom Yuen from the custody of Edward White, Commissioner of Immigration, and appellant herein, be reversed and that the said Tom Yuen be remanded to the custody of the said Commissioner of Immigration.

Dated this 14th day of March, A. D. 1916.

JNO. W. PRESTON,

United States Attorney.

CASPER A. ORNBAUM,

Asst. United States Attorney.

Service of the within Assignment of Errors by copy admitted this — day of March, 1916.

JOHN L. McNAB,
TIMOTHY HEALY,
Attorneys for Appellee.

[Endorsed]: Filed Mar. 15, 1916. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [27]

In the District Court of the United States, in and for the Northern District of California, First Division.

No. 15,933.

In the Matter of TOM YUEN, on Habeas Corpus.

Order Allowing Appeal.

On motion of John W. Preston, United States Attorney, and Casper A. Ornbaum, Assistant United States Attorney, attorneys for petitioner in the above-entitled cause.

IT IS HEREBY ORDERED that an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from an Order and Judgment heretofore made and entered herein, be, and the same is hereby allowed, and that a certified transcript of the records, testimony, exhibits, stipulations and all proceedings be forthwith transmitted to the said United States Circuit Court of Appeals for the Ninth Circuit, in the manner and time prescribed by law.

M. T. DOOLING,

Judge of the District Court.

Dated this 14th day of March, A. D. 1916.

Service of the within Order Allowing Appeal by copy admitted this — day of March 1916.

JOHN L. McNAB,
TIMOTHY HEALY,
Attorneys for Appellee.

[Endorsed]: Filed Mar. 15, 1916. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [28]

In the District Court of the United States, in and for the Northern District of California, First Division.

No. 15,933.

In the Matter of TOM YUEN, on Habeas Corpus.

Notice of Appeal.

To the Clerk of the Above-entitled Court, and to Tom Yuen and John L. McNab & Timothy Healy, Esqs., his Attorneys.

You and each of you will please take notice that Edward White, Commissioner of Immigration at the Port of San Francisco, appellant herein, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit, from an Order and Judgment made and entered herein on the 20th day of December, A. D. 1915, setting aside the Return to the Petition for a Writ of Habeas Corpus, and discharging the said Tom Yuen from the custody of the said Edward White, Commissioner of Immigration at the Port of San Francisco, and appellant herein.

Dated this 14th day of March, A. D. 1916.

JNO. W. PRESTON,
United States Attorney.
CASPER A. ORNBAUM,
Asst. U. S. Attorney.

Service of the within Notice of Appeal by copy admitted this —— day of March, 1916.

JOHN L. McNAB,
TIMOTHY HEALY,
Attorneys for Appellee.

[Endorsed]: Filed Mar. 15, 1916. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [29]

*In the District Court of the United States, in and for
the Northern District of California, First Division.*

No. 15,933.

In the Matter of the Application for a Writ of
Habeas Corpus in Behalf of TOM YUEN.

**Stipulation (Relative to Respondent's Exhibit
"A").**

IT IS HEREBY STIPULATED AND AGREED
by and between the respective parties in the
above-entitled cause that the original record of the
Bureau of Immigration, which was filed in the above-
entitled court as Respondent's Exhibit "A," and
which was made a part of Respondent's Return to the
Petition for a Writ of Habeas Corpus in said cause,
may be transferred, in its said original form and
without being transcribed, to the United States Cir-

cuit Court of Appeals for the Ninth Circuit, and the same is and may there be considered as a part of Respondent's Return to the said Petition for Writ of Habeas Corpus, and the record in determining this cause on appeal to the said United States Circuit Court of Appeals for the Ninth Circuit, without objection on the part of either of the said respective parties.

May 22, 1916.

JNO. W. PRESTON,
United States Attorney.
CASPER A. ORNBAUM,
Assistant U. S. Attorney.
Attorneys for Appellants.
JOHN L. McNAB,
TIMOTHY HEALY,
Attorneys for Respondent. [30]

*In the District Court of the United States, in and for
the Northern District of California, First Division.*

No. 15,933.

In the Matter of the Application for a Writ of Habeas Corpus in Behalf of TOM YUEN.

Order (Relative to Respondent's Exhibit "A").

It appearing to the Court that it is both necessary and proper that the original papers referred to in the above stipulation should be inspected in the United States Circuit Court of Appeals for the Ninth Circuit, in determining the appeal of said cause, the same having been made and considered a part of the

respondent's Return to the Petition for a Writ of Habeas Corpus.

IT IS THEREFORE ORDERED that the said original record be transferred by the clerk of this court to the clerk of the United States Circuit Court of Appeals for the Ninth Circuit, to be retained by said clerk until the appeal in the above-entitled cause is properly disposed of, at which time the said original papers are to be returned to the clerk of the above-entitled court.

March 23, 1916.

M. T. DOOLING,
Judge.

[Endorsed]: Filed Mar. 23, 1916. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [31]

**Certificate of Clerk, U. S. District Court, to
Transcript on Appeal.**

I, Walter B. Maling, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing 32 pages, numbered from 1 to 32, inclusive with the accompanying exhibit (transmitted separately in its original form), contain a full, true, and correct transcript of certain records and proceedings as the same now remain on file and of record in the office of the clerk of said District Court, in the matter of Tom Yuen, on Habeas Corpus, No. 15,933; which said Transcript on Appeal is made up pursuant to and in accordance with "Praecipe" (copy of which is embodied in this Transcript) and the in-

structions of attorneys for appellants herein.

Annexed hereto is the original Citation on Appeal issued herein (page 33).

IN WITNESS WHEREOF I have hereunto set my hand and the seal of said District Court this 12th day of April, A. D. 1916.

[Seal]

WALTER B. MALING,

Clerk.

By C. W. Calbreath.

CMT.

Deputy Clerk. [32]

(Citation on Appeal.)

UNITED STATES OF AMERICA,—ss.

The President of the United States, to Tom Yuen and John L. McNab & Timothy Healy, Esqs., His Attorneys, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the clerk's office of the United States District Court for the Northern District of California, First Division wherein Tom Yuen is appellant, and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable M. T. DOOLING,
United States District Judge for the Northern Dis-
trict of California this 14th day of March, A. D. 1916.

M. T. DOOLING,
United States District Judge. [33]

[Endorsed]: No. 15,933. United States District
Court for the ——— District of ———. Edward
White, etc., Appellant, vs. Tom Yuen. Citation on
Appeal. Filed Mar. 15. 1916. W. B. Maling, Clerk.
By C. W. Calbreath, Deputy Clerk.

[Endorsed] No. 2776. United States Circuit
Court of Appeals for the Ninth Circuit. Edward
White, as Commissioner of Immigration at the Port
of San Francisco, Appellant, vs. Tom Yuen, Ap-
pellee. Transcript of Record. Upon Appeal from
the United States District Court for the Northern
District of California, First Division.

Filed April 12, 1916.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

No. 2776

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

EDWARD WHITE, as Commis-
sioner of Immigration at the Port
of San Francisco,

Appellant,

vs.

TOM YUEN,

Appellee.

GOVERNMENT'S BRIEF

Upon Appeal from the Southern Division of the United States
District Court for the Northern District of California,
First Division

JOHN W. PRESTON,
United States Attorney,

CASPER A. ORNBAUN,
Asst. United States Attorney,

Attorneys for Appellant.

Filed this day of March, 1917.

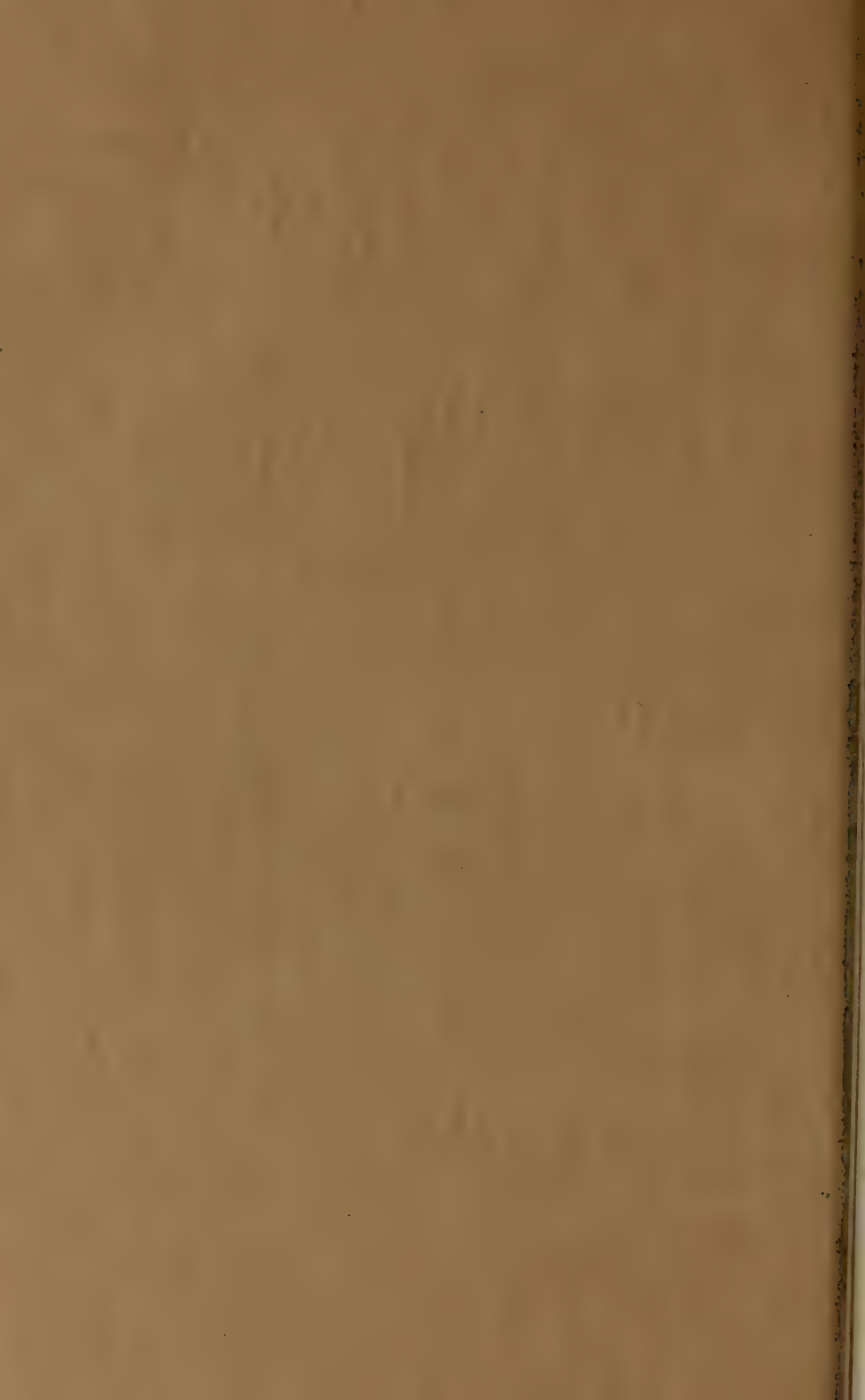
Filed

MAR 7 - 1917

By, Deputy Clerk.

F. D. Monckton,

Clerk.



No. 2776.

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

EDWARD WHITE, as Commis- sioner of Immigration at the Port of San Francisco,	} <i>Appellant,</i>
vs.	
TOM YUEN,	
	<i>Appellee.</i>

GOVERNMENT'S BRIEF

Respondent's Exhibit "A" constitutes the entire original record, duly certified, of the proceeding under Section 21 of the Immigration Act which resulted in the issuance by the Assistant Secretary of Labor of a warrant for the deportation of Tom Yuen, the appellee. This record was filed with and made a part of the appellant's Return to the Petition for a Writ of Habeas Corpus, filed in behalf of the said Tom Yuen in the court below, and was before that court when the final order was made discharging him from the custody of the appellant. It is here, without being transcribed, for the consideration of this court under an order of the court below. (Trans. pp. 31, 32.)

STATEMENT OF THE CASE

A summary of the facts, as they appeared in said immigration record, together with a recommendation that Tom Yuen's deportation be ordered, accompanied the record when it was submitted by the Assistant Commissioner General of Immigration to the Assistant Secretary of Labor for consideration and action, which summary, (Immigration record, pp. 97, 96) reads as follows, the references in brackets to pages, being inserted for convenience:

"Oct. 14, 1915.

In re TOM YUEN, entered presumably from Mexico, without inspection, at some unknown port, on or about August 1, 1915.

Memorandum for THE ASSISTANT SECRETARY

This Chinese person was arrested at Los Angeles, Cal., under warrant of August 4, 1915, on the grounds that he re-entered the United States in violation of Section 7, Chinese-exclusion Act of September 3, 1888, being a Chinese laborer who failed to produce to the proper officer the return certificate of section 36 of the Immigration Act (Rule 13).

This alien [pages 50-46] denies that he entered without inspection or has been out of the country since his original entry at San Francisco, about the year 1882. He claims to have proceeded from San Francisco to New York

City, where he resided for a period of 18 years; then returned to San Francisco for a few months; then went to Lordsburg, New Mexico, where he lived for six or seven years. From Lordsburg he went to Los Angeles a few weeks ago, at which latter place he was arrested. Laborers Certificate of Residence, No. 28667, issued to him at New York, in March, 1894, was found in his possession.

He has produced a few Chinese witnesses at Lordsburg, New Mexico, who testify [pages 65-68] that they have known him in Lordsburg for two or three years past. Even they however disclaim knowledge of his residence there longer than three years, whereas the alien claims six or seven. On the other hand a number of very reputable citizens of Lordsburg, both white and Chinese assert [pages 69-74] that they have never before seen or heard of him. One of these witnesses [page 73] is the constable and deputy sheriff there and keeps close watch on all strangers. Another witness testified that he had not spent a night out of this small town in ten years, and it would have been practically impossible for him not to have known of the alien. Two Chinese business residents [pages 71 and 72] who have spent a number of years in the town, and who undoubtedly know all other members of their race there, stated that Tom Yuen could not have lived in the town but a short time. Another witness, Ronald A. Egon [page 74] who drives an automobile for hire at Lordsburg, and has resided there for 15 years, knew nothing about the man, although he says that

he frequents Chinese restaurants. Guy Lemon, a reputed Chinese smuggler, admitted to Inspector McKee that he had placed two Chinese aliens in a box car in El Paso on July 22nd, and started them for Los Angeles, and that they had come over from Juarez, Mexico, two days previous [pages 25 and 24]. Upon examining the photograph of this alien he partially identified him as one of the two he had loaded into the car [pages 23 and 22]. Manuel O. Acosta [pages 54 and 53], a police sergeant of Juarez, Mexico, positively identified the alien as the same man he had seen on a number of occasions at the Juarez race track, in December, 1914, and January, 1915. His identification was made without hesitation and doubt. It is evident that the alien is not telling the truth, and when confronted with the sworn statements of reputable witnesses, simply designated them as lies.

The Bureau is convinced that the charges in the warrant of arrest are established, and upon those grounds has to recommend the alien's deportation to China at Government expense.

(sgd.) ALFRED HAMPTON,
Assistant Commissioner-General.

Approved:

(sgd.) LOUIS F. POST
Assistant Secretary

HMc/m

Certificate of residence
to be sent to Mr. Pittinger
for cancelation."

The result of the submission of the Immigration record to the Assistant Secretary was the issuance of a warrant for the deportation of Tom Yuen upon the two grounds charged in the warrant of arrest:

First: "I have become satisfied that the alien, Tom Yuen, who landed at an unknown port, on or about the 1st day of August, 1915, is subject to be returned to the country whence he came under section 21 of the immigration act approved February 20, 1907, being subject to deportation under the provisions of a law of the United States, to wit, The Chinese-exclusion laws, in that he re-entered the United States in violation of section 7, Chinese-exclusion act of September 13, 1888, being a Chinese laborer who failed to produce to the proper officer the return certificate required by said section."

Second: "I have become satisfied that the said alien has been found in the United States in violation of the act of Congress approved February 20, 1907, amended by the act approved March 26, 1910, in that he entered in violation of section 36 of said act (rule 13)."

When the case came before the court below, on demurrer to the petition, that court rendered the following opinion:

"Petitioner is a Chinese laborer who has been in this country for many years. He was registered in New York on March 2d, 1894, and at that time received a Chinese laborer's

certificate of residence which he had in his possession at the time of the hearing which led to the order of deportation that he is contesting in this proceeding. He has had no hearing before a Commissioner or Court. The proceedings leading to the order for his deportation were had before an Immigration Inspector, on the theory that sometime in December, 1914, and January, 1915, he was in Juarez, Mexico, and that therefore he must have entered this country within three years. To establish that fact the statement of one Acosta is relied upon. Acosta, who is a police officer in Juarez, Mexico, in an ex parte statement before an Inspector in El Paso, declared that he recognized a photograph shown him as that of a Chinese whom he had seen in Juarez in the latter part of December, 1914, and the early part of January, 1915. The photograph shown him is a photograph of petitioner. Unless petitioner has entered the United States within three years of the date of the hearing he may not be deported except after a hearing before a Commissioner, with the right of appeal to the Court. I have had occasion to hold before this, that the fact which gives jurisdiction to the Immigration Officers to hear and determine these matters, that his entry into the United States within three years, cannot be established by ex parte statements of witnesses in Mexico, who base their statements upon photographs, and are never confronted by the alien sought to be deported. In the absence of fair proof of such entry within three years the only tribunals that can

order the deportation of a Chinese laborer are the Commissioners and the Courts. I think the right of a laborer who has been long in this country to remain here is too important a right to be taken from him upon the ex parte statement of a resident of a foreign country who is never produced before him.

The demurrer to the petition will be overruled and the writ will issue returnable December 18th, 1915, at 10 o'clock A. M.

December 13, 1915.

M. T. DOOLING,
Judge."

Upon a further consideration of the case, when the appellant's return to the petition was filed, the court made his final order discharging Tom Yuen from custody. (Trans. pp. 22, 23.)

The assignment of errors filed by the appellant in this appeal is as follows:

'Now comes Edward White, Commissioner of Immigration at the Port of San Francisco, respondent in the above-entitled cause, and appellant in the appeal to the United States Circuit Court of Appeals, taken herein, by his attorneys, John W. Preston, United States Attorney, and Casper A. Ornbaun, Assistant United States Attorney, and files the following Assignment of Errors upon which he will rely in the prosecution of his appeal in the above-entitled cause, to the United States Circuit Court of Appeals for the Ninth Circuit, from

the Order and Judgment made by this Honorable Court on the 20th day of December, A. D. 1915.

I.

That the Court erred in granting the Writ of Habeas Corpus and discharging the alien, Tom Yuen, from the custody of Edward White, the said Commissioner of Immigration.

II.

That the said Court erred in holding that it had jurisdiction to issue the Writ of Habeas Corpus in the above-entitled cause, as prayed for in the petition of the said Tom Yuen for a Writ of Habeas Corpus.

III.

That the said Court erred in holding that the allegations contained in said petition for a Writ of Habeas Corpus were sufficient in law to justify the granting and issuing of a Writ of Habeas Corpus.

IV.

That the said Court erred in finding that the evidence upon which the Secretary of Labor issued the warrant of deportation for the said Tom Yuen was insufficient in character.

V.

That the said Court erred in holding that the entry of Tom Yuen into the United States from Mexico within three years could not be

established by ex parte statement of a witness whose only means of identification of the said Tom Yuen was by a photograph shown to him by the Immigration Officers.

VI.

That the Court erred in holding that the said Tom Yuen was illegally restrained of his liberty by Edward White, Commissioner of Immigration, and that the evidence taken in the hearing of this cause, under the Immigration Act of February 20, 1907, as amended by the Acts of March 26, 1910, and March 4, 1913, and the Chinese Exclusion Laws, was insufficient to justify the said respondent, as Commissioner of Immigration, to detain or deport the said Tom Yuen.

VII.

That the Court erred in discharging the said alien, Tom Yuen, from the custody of the said Edward White, Commissioner of Immigration, at the Port of San Francisco, and appellant herein.

WHEREFORE, appellant prays that the said Order and Judgment of the United States District Court, in and for the Northern District of California, made and entered herein, in the office of the clerk of the said court, on the 20th day of December, A. D. 1915, setting aside the Return to the Petition for a Writ of Habeas Corpus, and discharging the said Tom Yuen from the custody of Edward White, Commissioner of Immigration, and appellant herein, be

reversed and that the said Tom Yuen be remanded to the custody of the said Commissioner of Immigration.

Dated this 14th day of March, A. D. 1916.

JNO. W. PRESTON,
United States Attorney.

CASPER A. ORNBAUN,
Asst. United States Attorney."

ARGUMENT.

In view of the holding of the court below, the appellant is extremely desirous of impressing this court with the fact that the order of deportation of the Secretary of Labor was based upon two separate, distinct and wholly independent findings: first, that Tom Yuen was in the United States in violation of the Chinese Exclusion Laws, he having entered within three years in violation of Section 7 of the Chinese Exclusion Act of September 13, 1888; and secondly, that he was in the United States in violation of the Immigration Act of February 20, 1907, he having entered in violation of Section 36 thereof, in other words, without the inspection required by the Act of all aliens including Chinese. That a finding like the second with respect to a Chinese alien is in itself wholly sufficient to support an order of deportation—provided of course the hearing was not manifestly unfair and there was not a manifest abuse of discretion.

Low Wah Suey vs. Backus, 225 U. S. at p. 468— is settled by *United States vs. Wong You*, 223 U. S. 67. The finding in the case at bar, being a finding that an alien is in the country in violation of a provision of the Immigration Act, and being made by the Secretary of Labor, who had the exclusive power to make it, the principle so often reiterated by the Supreme Court, this Court, and practically all other federal courts, as to absolute finality of such a finding of fact when based upon *some* evidence (not necessarily legal evidence) after a fair, though summary hearing, is fully applicable.

In his opinion above set forth, the District Court alludes to his decision in the case of *Owe Sam Goon*, in which his order discharging that Chinese alien from the custody of the Immigration officials who held him under an order of deportation, likewise issued by the Secretary of Labor, based upon findings identical with the two made in the present case, was affirmed by this court, 235 Fed. 847. In that case, and in the present case, the District Court held that because the jurisdiction to order the deportation of Chinese found in the United States in violation of the exclusion laws, had always rested exclusively in United States Commissioners and courts until concurrent jurisdiction was given the Secretary of Labor by the immigration act of February 20, 1907, the Secretary of Labor could not exercise this concurrent jurisdiction where the evidence against the Chinaman was not such as would be admissible in a court

of law. In deciding the appeal in that case this court is confidently believed not to have extended that view to cases at least where the Secretary of Labor orders aliens deported upon becoming satisfied that they are here in violation of the immigration act. This belief is stated with the utmost confidence and because of the long line of decisions of the Supreme Court from *Ekin* vs. *United States*, 142 U. S. 651 down, and of this Court, of which the following, all rendered within the last two or three years, are the most recent, in which it has been uniformly held that the Secretary of Labor's orders of deportation are final, even when based upon findings made from ex parte affidavits, reports of his officers, newspaper clippings, identification by photograph, etc.

White vs. *Gregory*, 213 Fed. 768,

Healy vs. *Backus*, 221 Fed. 358,

Choy Gum vs. *Backus*, 223 Fed. 48,

Wong Back Sue vs. *Connell*, 233 Fed. 659.

The last case cited, *Wong Back Sue* vs. *Connell*, was decided by this court in July 1916, only three months before the *Owe Sam Goon* case, *supra*, was decided by this Court. The only finding of the Secretary of Labor in the *Wong Back Sue* case was that the Chinaman, who was also a registered laborer, was in the United States in violation of Section 7 of the Chinese exclusion act of September 13, 1888, there being no additional finding as in the *Owe Sam*

Goon case and the case at bar, that he was in the United States in violation of Section 36 of the immigration act. The fact that the only evidence upon which the Secretary of Labor based his finding that Wong Back Sue had been in Mexico were four statements, two by white men, and two by Chinese, that they had seen him there. Each and every one of these four men identified Wong Back Sue by photograph, there being absolutely nothing in the record that even suggests that they saw Wong Back Sue personally after his arrest by the Immigration officials. This court could not have sustained the Secretary of Labor's order of deportation in the Wong Back Sue case had it taken the view of the court below in the Owe Sam Goon case and the case at bar, that the Secretary must base his finding that a Chinese is in the United States in violation of Section 7 of the Chinese exclusion act of September 13, 1888, upon evidence admissible in a court of law. The evidence that the said Owe Sam Goon and Tom Yuen in the case at bar, were in Mexico, is exactly the same in *character* as was the evidence that Wong Back Sue was in Mexico. There is, however, a difference in the quantity and weight of the evidence, there being four witnesses on the point in question in the Wong Back Sue case and only one in each of the other two cases.

It is not difficult to interpret the refusal of this court in the Owe Sam Goon case to sustain the Secretary of Labor's finding, under either the Chinese exclusion, or the immigration law, as simply a hold-

ing that it was an abuse of discretion on the part of the Secretary to find as he did solely upon the statement of the one witness—the Mexican Carrion.

Upon the point of unfairness, this court pointed out that if Owe Sam Goon had in fact worked in a laundry at Juarez, Mexico, the Immigration officers could certainly have secured evidence of that fact in addition to Carrion's statement, and that their failure to do so justified the presumption that such evidence as could have been secured would have been against the government's claim that Owe Sam Goon had been in Mexico. It was further pointed out in the decision that although Owe Sam Goon's claims that he had been employed at well-known places and by well-known persons in California, were easy of investigation, no investigation of them had been made by the Immigration officers.

In view of the foregoing, in order to secure a favorable decision in the case of Tom Yuen now under consideration, it seems necessary for the government to show that it appears from the Immigration record that was before the Secretary that a fair investigation was made, and that the Secretary's finding, based upon that record, does not amount to an abuse of discretion—in other words, that there was *some* evidence, not necessarily such as would be admissible in a court of law, to support the findings.

In his statement (Immigration record, p. 54), Acosta shows himself to be a police officer of Juarez,

Mexico, who, because of his extensive dealings with Chinese there, was peculiarly qualified to identify Tom Yuen. He identified Tom Yuen's photograph readily and positively as a Chinaman that he had seen a number of times in the space of about a month going by the race track in Juarez, where Acosta was a special police officer at that time. The inspector who took Acosta's statement certifies (Immigration record, p. 53): "I am favorably impressed with the witness, Acosta, and his manner of testifying".

It will be observed that Tom Yuen's place of abode in Juarez was not known by Acosta and could not reasonably have been ascertained after his arrest. As must have been well known by the Secretary, as well as the Immigration officers, extensive smuggling of Chinese from Mexico into the United States had for years been carried on over the Mexican border in the vicinity of Juarez, the Chinese to be smuggled being kept in Juarez by the smugglers awaiting arrangements for their being taken over the border and shipped to interior points. As a result of this, Juarez has always had a considerable transient Chinese population, and the mere fact that Acosta, as a police officer, saw Tom Yuen only within a space of about a month, makes it extremely probable that Tom Yuen was one of those transient Chinese who had no occupation and whose temporary place of abode was naturally kept secret.

It will be remembered that it was claimed that Owe Sam Goon was employed in a laundry—a place open

to the public—and for that reason it might well be said that witnesses in addition to Carrion could in all probability have been obtained to substantiate that claim, if it were true. As has been indicated, it was different in Tom Yuen's, the presumption being that the statement of Acosta was the best and the only evidence reasonably obtainable regarding the presence of Tom Yuen in Mexico. Even if it were necessary, Tom Yuen could not have been taken into Mexico to be identified personally by Acosta and, on the other hand, Acosta could not have been legally summoned from a place in the United States, let alone from a foreign country, to identify Tom Yuen.

Low Wah Suey vs. Backus, 225 U. S. at p. 470.

The criticism in the Owe Sam Goon case that the claims of residence in the United States made by the alien, while easy of verification, were not investigated, certainly does apply in this case. Tom Yuen, from the time of his arrest, consistently maintained that he had been continuously employed in the Tom Tong Restaurant in the town of Lordsburg, New Mexico, for six or seven years last past.

In the first place, the supervising inspector of immigration at El Paso, Texas, in whose district Lordsburg, New Mexico, was, certified (Immigration record p. 19) that there was no record of Tom Yuen in his office, although during the last two years immigration officers from time to time under his imme-

diate direction had made inspections of the Chinese at Lordsburg and reported thereon to him; although census lists prepared during the last two years of the Chinese residents of Lordsburg were in his office, and although strict inspections had been made and reported to him of the open movements of Chinese, including those who were in Lordsburg.

In the next place a very thorough investigation of Tom Yuen's claim of six or seven years' continuous residence at Lordsburg was made, as is shown by the report of the inspector who made it (immigration record pp. 79 to 75). In this report the inspector states (p. 78):

“With respect to the claim of Tom Yuen that he worked as cook at the Tom Tong Restaurant at Lordsburg for the past six or seven years, I desire to say that apart from the fact that my records fail to show any check of the papers of Tom Yuen, I am positive that on none of the occasions within the last year and a half upon which I visited and inspected the Tom Tong premises was Tom Yuen on such premises, and it will be noted later that such of the employees of this restaurant as seek to support the statements of Tom Yuen, claim that he was *sleeping on the premises* on the occasion of these visits.”

It will be noted that the only witnesses who claimed to have known Tom Yuen as a resident of Lordsburg were four Chinese who were employed in the aforesaid Tom Tong Restaurant, and that three of them—

although they had been in that restaurant for a longer period—stated that he had been there only for about a year and a half or two years (Immigration record pp. 65 to 67), while the fourth, Hom (Ham) Bing Lim (p. 68) stated that he had worked in that restaurant continuously since 1912, and finally admitted that Tom Yuen had come there only about three weeks before, staying only about two weeks, and that he had never seen Tom Yuen before that. This, coming evidently from a reluctant witness, who was in the best possible position to know the facts, is the strongest kind of evidence to refute Tom Yuen's claim that he had resided at Lordsburg for six or seven years just prior to his arrest. It would be entirely consistent with the experiences of the immigration officers in their investigations of smuggling operations, that Tom Yuen was secretly taken from the border, not improbably in a freight car, to Lordsburg, a convenient point for the distribution of Chinese to more interior points of destination. Being known by the Chinese of the restaurant as a smuggled Chinaman, it is not surprising that they should have been disposed when examined to say that Tom Yuen had been there for a long time. The only trouble with the testimony of those who so stated was that they did not know how long a time Tom Yuen might claim if questioned that he had been there, and hence a significant discrepancy between their testimony and his as to time. Tom Yuen's having been in Lordsburg even for two weeks would account for his limited knowledge of the town, which was confined strict-

ly to the immediate neighborhood of the restaurant in question.

The witnesses examined in Lordsburg who were not connected with the restaurant were plainly disinterested. It is unbelievable that Tom Yuen could have lived in that small town for six or seven years and not have been known to the two Chinese merchants who testified that they had never seen him.

Ronald A. Egon testified (immigration record p. 74) that although he had lived next door to the aforesaid Tom Tong Restaurant for four years and had visited there several times daily, which made him familiar with all the Chinese who had worked there both day and night, he was sure that Tom Yuen had never worked in that restaurant. As to this witness Egon, the examining inspector states (immigration record p. 78) that he "considered Egon a first-class witness and in a position to know facts as to which he testified" and (immigration record p. 79) "he is a bright, intelligent young man".

Supplementing the statement of Oscar E. Allen, (immigration record p. 73) Constable and Deputy Sheriff at Lordsburg, who did not know Tom Yuen, the inspector reports (immigration record p. 76)—

"In addition to the grounds for familiarity with conditions set forth in his statement, Allen stated later that Tom Tong's Restaurant has the contract for feeding the County prisoners at Lordsburg, and that he, Allen, frequently made trips to that place three or four times a day".

Just above this, the inspector stated—

“The statements of R. A. Egon and Oscar E. Allen I consider quite conclusive.”

Surely it cannot be seriously contended that the Secretary of Labor acted arbitrarily when he refused to believe that Tom Yuen had been a resident of Lordsburg, as claimed.

That the photograph of Tom Yuen in the immigration record (p. 80) represents Tom Yuen, there can be no doubt. He, himself, admitted it (p. 82 immigration record) and it will be observed that it is a photograph of the same person represented by the photographs attached to affidavits filed in his behalf (immigration record pp. 64 to 59).

In conclusion, it is submitted that inasmuch as Tom Yuen's claim of residence at Lordsburg was shown to be false, there was no abuse of discretion on the part of the Secretary of Labor in becoming satisfied from the positive evidence of Acosta, and all the circumstances of the case, that Tom Yuen had been in Mexico shortly before his arrest.

Respectfully submitted,

JOHN W. PRESTON,
United States Attorney.

CASPER A. ORNBAUN,
Asst. U. S. Attorney.
Attorneys for Appellant.

No. 2776

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

EDWARD WHITE, as Commissioner
of Immigration at the Port of
San Francisco,

Appellant,

VS.

TOM YUEN,

Appellee.

BRIEF FOR APPELLEE.

JOHN L. McNAB,
TIMOTHY HEALY,
Attorneys for Appellee.

Filed this.....*day of March, 1917.*

FRANK D. MONCKTON, *Clerk.*

By.....*Deputy Clerk.*

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EDWARD WHITE, as Commissioner of Immigration at the Port of San Francisco,	} <i>Appellant,</i>
VS.	
TOM YUEN,	
	} <i>Appellee.</i>

BRIEF FOR APPELLEE.

The Secretary of Labor issued a warrant of deportation on the assumption that jurisdiction was conferred by the alleged entry of Tom Yuen into the United States within three years prior to his arrest by Immigration Officers at Los Angeles, California.

The only evidence in the record supporting this theory is the ex parte statement of one Acosta, a police officer in Juarez, Mexico, who declared that a photograph shown him was that of a Chinese whom Acosta saw in Mexico in the latter part of December, 1914, or the early part of January, 1915. The photograph shown Acosta was a photograph of appellee.

Acosta was never confronted by Tom Yuen.

Appellee can add nothing to the decisions on the point in the cases of

Whitfield v. Hanges, 222 Fed. 748-749 (Eighth Circuit);

Backus v. Owe Sam Goon, 235 Fed. 847 (Ninth Circuit).

Dated, San Francisco,
March 7, 1917.

Respectfully submitted,

JOHN L. McNAB,

TIMOTHY HEALY,

Attorneys for Appellee.

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